

## INTERNATIONAL LAW'S UNHELPFUL ROLE IN THE SENKAKU ISLANDS

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“[T]here occurred violent earthquakes and floods; and in a single day and night of misfortune all your warlike men in a body sank into the earth, and the island of Atlantis in like manner disappeared in the depths of the sea.”

Plato – *Timaeus* <sup>1</sup>

### 1. INTRODUCTION

The Senkaku group consists of eight uninhabited islands, with a total land area of less than seven square kilometers.<sup>2</sup> They lie roughly 120 nautical miles northeast of Taiwan, 200 nautical miles east of mainland China, and 240 nautical miles southwest of Japanese Okinawa.<sup>3</sup> These specks of land are, however, of immense economic and strategic importance. Under the international law of the sea, control of the Senkakus may convey exclusive economic rights to nearly 20,000 square nautical miles of

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<sup>1</sup> PLATO, *TIMAEUS* 39 (Benjamin Jowett trans., Liberal Arts Press 1949) (360 BCE).

<sup>2</sup> The Chinese call the islands “Diaoyutai” or “Tiaoyutai.” For simplicity, this Article uses the island group’s more familiar Japanese name.

<sup>3</sup> The islands are located between 25°40’ and 26° North, and 123° and 124° and 34’ longitude. Hungdah Chiu, *An Analysis of the Sino-Japanese Dispute over the T’iaoyutai Islets (Senkaku Gunto)*, 15 *CHINESE TAIWAN Y.B. INT’L L. & AFF.* 9, 9 (1996–97).

undersea resources.<sup>4</sup> Experts believe that hydrocarbon reserves rivaling those of the Persian Gulf may lie beneath the surrounding seas.<sup>5</sup> It is perhaps unsurprising, then, that Japan and China both claim sovereignty over the islands, one of Asia's most dangerous strategic flashpoints for more than thirty years. Japan and China dispute the sovereignty of the Senkakus and the surrounding seas on the basis of rival interpretations of the treaties ending the Sino-Japanese and Second World Wars, as well as of the customary international law of territorial acquisition.<sup>6</sup> Despite the vast flow of commerce and investment crossing the East China Sea, the islands' unsettled status is a continuing source of tension between China and Japan and frustrates a definitive demarcation of the overall maritime boundary between the two countries. Although both sides profess a commitment to solving their dispute peacefully, efforts to reach a negotiated settlement have consistently failed.<sup>7</sup> Indeed, over the past three decades, Chinese and Japanese forces have menaced each other in the disputed seas around the islands

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<sup>4</sup> See VICTOR PRESCOTT & CLIVE SCHOFIELD, *THE MARITIME POLITICAL BOUNDARIES OF THE WORLD* 438 (2d ed. 2005) [hereinafter PRESCOTT & SCHOFIELD].

<sup>5</sup> SELIG S. HARRISON, *SEABED PETROLEUM IN NORTHEAST ASIA: CONFLICT OR COOPERATION?* 5-6 (Woodrow Wilson International Center for Scholars 2005), available at [http://www.wilsoncenter.org/topics/docs/Asia\\_petroleum.pdf](http://www.wilsoncenter.org/topics/docs/Asia_petroleum.pdf).

<sup>6</sup> The governments of both mainland China and Taiwan are in unusual agreement that the Senkakus belong to China. Compare Statement on the Chinese position toward the Ryukyu Islands and the T'iaoyutai Islets, Ministry of Foreign Affairs of the Republic of China (Taiwan) (June 12, 1971) (declaring that "[t]he islets are affiliated with the Province of Taiwan and constitute a part of the territory of the Republic of China") with Statement of the Ministry of Foreign Affairs of the People's Republic of China (Dec. 30, 1971) (declaring that the islands are "islands appertaining to Taiwan. Like Taiwan, they have been an inalienable part of Chinese territory since ancient times. . . . The Chinese people are determined to liberate Taiwan! The Chinese people are determined to recover the Tiaoyu and other islands appertaining to Taiwan!"). For a translation of both of these documents, see Chiu, *supra* note 3, at 13-17.

<sup>7</sup> See Zhiguo Gao & Jilu Wu, *Key Issues in the East China Sea: A Status Report and Recommended Approaches*, in *SEABED PETROLEUM IN NORTHEAST ASIA: CONFLICT OR COOPERATION?* 32, 37 (Woodrow Wilson International Center for Scholars 2005), available at [http://www.wilsoncenter.org/topics/docs/Asia\\_petroleum.pdf](http://www.wilsoncenter.org/topics/docs/Asia_petroleum.pdf) ("The East China Sea is perhaps one of the most complicated marine areas anywhere in the world in terms of its overlapping claims, sovereign disputes over islands and boundary delimitation. No progress has been achieved in negotiating bilateral maritime boundaries over a long period of 35 years.").

and even trained weapons.<sup>8</sup> Deep-seated historical and cultural antagonisms exacerbate the dispute.

Although the United States has avoided taking a position on the question of “ultimate sovereignty” over the islands, the dispute is nevertheless of serious concern to Americans.<sup>9</sup> The United States is pledged to defend Japan under the terms of a Mutual Security Treaty which it interprets to apply to all “territories under the administration of Japan.”<sup>10</sup> With 50,000 soldiers and sailors permanently stationed in Japan, the United States would probably be drawn into any conflict over the Senkakus.<sup>11</sup> U.S. warships have already participated in massive Japanese war games designed to simulate operations to recapture the Senkakus from Chinese forces.<sup>12</sup>

Both countries’ arguments for sovereignty over the islands are discussed below, but this Article does not presume to add to the already vast body of scholarship purporting to solve the legal puzzle of the islands’ status.<sup>13</sup> Instead, this Article argues that, at least in the case of the Senkaku islands, the international law regimes that might have been expected to guide the parties toward

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<sup>8</sup> See, e.g., *Two Japanese Fighters Scramble Over Senkaku Islands*, JAPAN ECON. NEWSWIRE, Aug. 24, 1995; *Chinese Research Ship Sighted Near Senkaku Isles*, THE DAILY YOMIURI (Japan), Feb. 5, 2007, at 2, available at <http://www.yomiuri.co.jp/dy/world/20070205TDY02008.htm>.

<sup>9</sup> Adam Erel, State Dep’t Deputy Spokesman, State Department Noon Briefing, Mar. 24, 2004, available at <http://www.globalsecurity.org/military/library/news/2004/03/mil-040324-usia03.htm>.

<sup>10</sup> Treaty of Mutual Cooperation and Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1632; Erel, *supra* note 9.

<sup>11</sup> U.S. Forces Japan Fact Sheet, <http://www.usfj.mil/> (last visited Mar. 14, 2007). The 50,000 total includes personnel assigned to the U.S. Navy’s Seventh Fleet, much of which is based in Japan, but not under the U.S. Forces Japan command structure. See Erel, *supra* note 9.

<sup>12</sup> More than a hundred ships from the Japanese Maritime Self-Defense Force (JMSDF) and the United States Navy participated in “Annalex 18G,” a 2006 practice run for a naval conflict pitting China against the United States and Japan. *Joint Drill Based on Retaking Senkakus*, JAPAN TIMES, Dec. 30, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20061230a6.html>. The thinly-veiled premise of the exercise was that China, tactfully labeled “country orange,” had seized the Senkakus from Japan (“country blue”). *Id.* With help from the United States (“country green”), Japan staged an amphibious operation to recapture the islands. *Id.* As the *Japan Times* noted, this exercise was “the first to stage a mock invasion by China of Japanese-controlled territory.” *Id.*

<sup>13</sup> Compare GREG AUSTIN, CHINA’S OCEAN FRONTIER: INTERNATIONAL LAW, MILITARY FORCE AND NATIONAL DEVELOPMENT 162-76 (1998) (arguing for “Japan’s Superior Rights in the Senkaku Islands”) with Chiu, *supra* note 3, at 28 (concluding that “the law apparently favors the Chinese side”).

a reasoned and peaceful settlement have, if anything, impeded a lasting and legitimate settlement important to peace and security in East Asia. Its conclusions may be especially timely at a time when resource-driven maritime disputes are proliferating around the globe.

This Article argues that the applicable international law regimes have impeded a Sino-Japanese settlement over the Senkakus in three key ways.

First, the one-size-fits-all approach of international legal regimes such as the United Nations Convention on the Law of the Sea ("UNCLOS") may sometimes be their most dangerous aspect.<sup>14</sup> The Law of the Sea Convention's general rules are not tailored to, and cannot easily accommodate, the unique political geography of the East China Sea. By enabling whichever country has sovereignty over the Senkakus to claim exclusive rights over resources hundreds of miles offshore, the law of the sea has inflamed the dispute by vesting otherwise worthless islands with immense economic value.<sup>15</sup>

Second, the international customary law governing the acquisition of territory encourages the "display of sovereignty" and penalizes states for appearing to "acquiesce" in a rival state's claim to disputed territory.<sup>16</sup> When territories are disputed in an atmosphere of passionate nationalism, as are the Senkakus, the need to demonstrate sovereignty and avoid acquiescence—or the appearance of acquiescence—in a rival's claim may prompt a series of dangerous escalatory gestures.

Third, the vagueness of customary international law simultaneously encourages parties to invoke international legal norms which can almost always be construed to fit their interests, while dissuading them from trying to resolve their dispute through legal processes. Though many respected international scholars assume that creating global judicial institutions will cause states to

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<sup>14</sup> United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

<sup>15</sup> UNCLOS arts. 56–57 allow a country to declare an "exclusive economic zone" of up to 200 nautical miles from its coast, within which it may exercise "sovereign rights for the purpose of exploring and exploiting . . . the natural resources, whether living or non-living, of the . . . seabed and its subsoil." *Id.*

<sup>16</sup> See Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 13 (2000).

resolve their disputes before these institutions, or at least to “bargain in the shadow of anticipated legal decisions,” the Senkakus present a counter-example.<sup>17</sup> The malleability of the available legal principles has allowed both China and Japan to justify their claims to sovereignty by invoking international law, even though neither has shown interest in having the islands’ status adjudicated on the merits by an international body. As will be argued below, the unpredictability of litigation, the probable domestic illegitimacy of any adverse result, and the lack of any means short of force to enforce a judgment all work to discourage litigation or arbitration. These same factors make it similarly difficult for the parties to resolve their dispute by “bargaining in the shadow” of international law and underscore the limited value of the international judicial system in high-stakes cases.

The result is a stalemate which poses a serious threat to peace in the region. As Japanese and Chinese demand for fossil fuels continues to soar, the islands may become a progressively more valuable prize.<sup>18</sup> As such, the role of international legal regimes in the Senkaku dispute should prompt reflection on the effectiveness of global legal schemes in resolving resource conflicts in areas of contested sovereignty.

In presenting the above arguments, this Article will proceed in the following sequence. It will first explain the basic principles of the relevant international legal regimes and describe how the sovereignty dispute first arose. The Article will then evaluate the legal merits of the Japanese and Chinese claims. Next, it will assess the impact of international law on the dispute, arguing that global legal regimes have enmeshed the division of the East China Sea’s undersea resources in emotional disagreements over entitlements to sovereign territory, while neither encouraging nor enabling either party to try to resolve the problem through the application

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<sup>17</sup> See, e.g., Kenneth W. Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 431-34 (2000) (noting that contracting and negotiating costs are exceptionally high for legal agreements and that soft law alternatives may be preferable).

<sup>18</sup> China is the world’s third-largest oil importer after the United States and Japan. In 2006, China accounted for an estimated 38% increase in world oil demand. See UNITED STATES ENERGY INFORMATION ADMINISTRATION, COUNTRY ANALYSIS BRIEF: CHINA (Aug. 2006), <http://www.eia.doe.gov/emeu/cabs/China/Full.html>. Japan is the world’s second-largest oil importer. UNITED STATES ENERGY INFORMATION ADMINISTRATION, COUNTRY ANALYSIS BRIEF: JAPAN (Dec. 2006), <http://www.eia.doe.gov/emeu/cabs/Japan/Full.html>.

of international law. This Article will conclude by reflecting on the implications of international law's role in perpetuating the stalemate over the Senkaku islands for other sovereignty and resource disputes, as well as with some more general observations.

## 2. APPLICABLE INTERNATIONAL LEGAL REGIMES

Before continuing farther, it may be helpful to explain the basics of the law relevant to the Senkaku islands dispute. The international law of the sea vests the Senkaku islands with almost all of their practical value.<sup>19</sup> The law of the sea is one of the oldest and most developed areas of public international law, and has been extensively codified in the Law of the Sea Convention to which Japan and China are both parties.<sup>20</sup> The customary international law of territorial acquisition probably determines which country enjoys sovereignty over the Senkakus, although China also advances arguments based on the treaties that ended World War II in the Pacific.

### 2.1. Law of the Sea

The chief benefit of sovereignty over the Senkaku islands is their presumed ability, under UNCLOS, to project areas of maritime jurisdiction over the East China Sea. UNCLOS sets out a system of geographic categories to balance national and international rights over areas of ocean. The basic principle is that a coastal state's authority over adjacent seas should be at a maximum close to shore but diminish farther out to sea.<sup>21</sup>

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<sup>19</sup> The islands' strategic location may conceivably make them useful as radar and missile platforms. See *Diaoyu Islands: Inalienable Part of China's Territory*, Dep't. of English & Int'l Studies, China Foreign Affairs University, Aug. 15, 2006, available at [http://janson1986.blog.hexun.com/4439776\\_d.html](http://janson1986.blog.hexun.com/4439776_d.html) (expressing the fear that if Japan were to place military bases on the Senkakus, the islands would "become a time bomb placed at the gate of China").

<sup>20</sup> Although one hundred and fifty-three countries have ratified UNCLOS, the United States has not. See United Nations Division for Ocean Affairs and the Law of the Sea, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as of Feb. 1 2008, [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm) (last visited Feb. 27, 2008). The Convention was detested by American conservatives who preferred to call it the "LOST" Treaty. See, e.g., Doug Bandow, *Don't Resurrect the Law of the Sea Treaty*, POL'Y ANALYSIS No. 552 (2005), available at <http://www.cato.org/pubs/pas/pa552.pdf> (arguing that there is no benefit to the United States ratifying of the Law of the Sea Treaty).

<sup>21</sup> This reflects a balance between the traditional alternatives of *mare liberum* ("freedom of the seas") and *mare clausum* as advocated by seventeenth-century

UNCLOS accordingly specifies the rights and obligations of coastal states with regard to a hierarchy of "zones" of ocean space.<sup>22</sup> The Convention in turn defines these zones by their distance from a state's "baseline."<sup>23</sup> The low-tide line serves as a default baseline.<sup>24</sup> When, however, a coast is "deeply indented" or has "a fringe of islands," UNCLOS permits countries to draw "straight baselines" between "appropriate points."<sup>25</sup> Archipelagic states may also draw straight baselines "joining the outermost parts of their outermost islands," provided that they do so in accordance with complex geometric rules.<sup>26</sup> The Convention allows islands to generate the same offshore jurisdictional zones as mainland territories, so long as the islands are not "rocks which cannot sustain human habitation or economic life of their own."<sup>27</sup> Which bodies should be considered rocks, and which islands, is often the subject of fierce debate.<sup>28</sup>

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jurists Hugo Grotius and John Selden, respectively. See generally HUGO GROTIUS, *MARE LIBERUM* (1609); JOHN SELDEN, *MARE CLAUSUM, SEU, DE DOMINIO MARIS* (1635).

<sup>22</sup> See UNCLOS, *supra* note 14, at arts. 3 ("Territorial Sea"), 8 ("Internal Waters"), 55-57 ("Exclusive Economic Zone") and 77-78 ("Continental Shelf"). See also PRESCOTT & SCHOFIELD, *supra* note 4, at 9-47.

<sup>23</sup> See UNCLOS, *supra* note 14, at arts. 3 ("Territorial Sea"), 8 ("Internal Waters"), 55-57 ("Exclusive Economic Zone"), and 77-78 ("Continental Shelf").

<sup>24</sup> UNCLOS, *supra* note 14, at art. 5 ("[T]he normal baseline . . . is the low-water line along the coast.").

<sup>25</sup> UNCLOS, *supra* note 14, at art. 7 ("In localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured."). For the complex results of this practice around the world, see PRESCOTT & SCHOFIELD, *supra* note 4, at 144-64.

<sup>26</sup> UNCLOS, *supra* note 14, at art. 47(1) ("An archipelagic State may draw straight baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of land, including atolls, is between 1 to 1 and 9 to 1."). See also PRESCOTT & SCHOFIELD, *supra* note 4, at 167-81.

<sup>27</sup> UNCLOS, *supra* note 14, at art. 121 ("(1) An island is a naturally formed area of land, surrounded by water, which is above water at high tide[;] (2) Except as provided for in paragraph 3, the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory[;] (3) Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf.").

<sup>28</sup> See PRESCOTT & SCHOFIELD, *supra* note 4, at 58-89.

UNCLOS defines the following bands of sea space, moving outwards from the coast. Closest to land are internal waters, which lie to landward of straight baselines.<sup>29</sup> States possess full sovereign authority within their internal waters, just as they would on shore.<sup>30</sup> Next, states are entitled to claim a territorial sea extending up to twelve nautical miles from the baseline.<sup>31</sup> Within a territorial sea, a state has full sovereignty over the seabed, water column, surface and airspace, but must permit the "innocent passage" of other countries' vessels.<sup>32</sup> States are further entitled to claim an exclusive economic zone ("EEZ") extending up to 200 nautical miles from the baseline, in which they enjoy "sovereign rights" over the resources of the water column and the seabed, but cannot restrict freedom of navigation, overflight, or the laying of undersea cables.<sup>33</sup> Finally, UNCLOS allows states to claim authority over the seabed of their continental shelves.<sup>34</sup> Shelf rights are frequently subsumed in EEZs, because UNCLOS presumes that a country's continental shelf, like its EEZ, extends 200 nautical miles beyond the baseline.<sup>35</sup> If, however, the "natural prolongation" of a country's landmass extends beyond 200 nautical miles, UNCLOS allows a country to define a wider continental shelf, up to a maximum of 350 nautical miles from the baseline, with clearance from the United Nations Commission on the Limits of the Continental Shelf.<sup>36</sup> With this one minor exception, the High

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<sup>29</sup> UNCLOS, *supra* note 14, at art. 8.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.* at art. 3.

<sup>32</sup> *Id.* at arts. 2-4; 17-33. *See also* PRESCOTT & SCHOFIELD, *supra* note 4, at 14-18.

<sup>33</sup> UNCLOS, *supra* note 14, at arts. 55-58. *See also* PRESCOTT & SCHOFIELD, *supra* note 4, at 19-23.

<sup>34</sup> UNCLOS, *supra* note 14, at arts. 76-78. *See also* PRESCOTT & SCHOFIELD, *supra* note 4, at 13-26.

<sup>35</sup> The actual undersea topography is irrelevant for the first 200 nautical miles in delimited continental shelf claims. *See* UNCLOS, *supra* note 14, at art. 76 (1) ("The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.")

<sup>36</sup> UNCLOS, *supra* note 14, at art. 76(1), (8) ("Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal State to the Commission on the Limits of the Continental Shelf . . . . The limits of the shelf established by a coastal State on the basis of these recommendations shall be final



Seas begin after the 200 nautical mile EEZ limit.<sup>37</sup> On the High Seas, all states may navigate freely and exploit natural resources and none may claim sovereignty or jurisdiction.<sup>38</sup>

UNCLOS' seemingly clear framework is extremely difficult to apply in practice. In any sea less than 400 nautical miles across, areas of maritime jurisdiction will overlap. The East China Sea is only 360 nautical miles across at its widest point. UNCLOS is vague about how to resolve overlapping EEZ or continental shelf claims, instructing only that "the delimitation of the exclusive economic zone [or continental shelf] between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law . . . in order to achieve an equitable solution."<sup>39</sup>

In this respect, UNCLOS is much fuzzier than its predecessor, the 1958 Geneva Convention on the Continental Shelf, which was in effect when the Senkakus dispute first erupted.<sup>40</sup> The Continental Shelf Convention provided that "in the absence of agreement . . . the boundary shall be determined by application of the principle of equidistance . . ." <sup>41</sup> By contrast, adjudicators applying UNCLOS may consider all sorts of non-geographic factors in settling overlapping EEZ claims.<sup>42</sup> Nevertheless, geography remains the "dominant factor" in maritime boundary delimitation.<sup>43</sup> Dividing EEZ claims along a line equidistant from the relevant baselines is still the most popular and straightforward method of determining maritime boundaries.<sup>44</sup> International

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and binding."). See also PRESCOTT & SCHOFIELD, *supra* note 4, at 24.

<sup>37</sup> UNCLOS, *supra* note 14, at art. 86 (stating that the high seas include "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State").

<sup>38</sup> UNCLOS, *supra* note 14, at art. 87(1) ("The high seas are open to all States, whether coastal or land-locked."). See also PRESCOTT & SCHOFIELD, *supra* note 4, at 27-29.

<sup>39</sup> UNCLOS, *supra* note 14, at arts. 74(1) (discussing the EEZ) and 83(1) (discussing the continental shelf).

<sup>40</sup> Continental Shelf Convention art. 1, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311, 312, (entered into force June 10, 1964) [hereinafter "Continental Shelf Convention"].

<sup>41</sup> *Id.* at art. 6(2).

<sup>42</sup> See *Continental Shelf (Libya v. Malta)*, 1985 I.C.J. 13, 18 (June 3) ("[D]elimitation is to be effected in accordance with equitable principles and taking account of all relevant circumstances in order to achieve an equitable result.").

<sup>43</sup> PRESCOTT & SCHOFIELD, *supra* note 4, at 221.

<sup>44</sup> See Leonard Legault & Blair Hankey, *Method, Oppositeness and Adjacency*,

courts have recognized the continuing strength of the equidistance principle in deciding recent maritime boundary cases: the International Court of Justice (ICJ) favors a two-stage approach in which the Court first defines a provisional equidistant line and then considers whether special circumstances require its equitable adjustment.<sup>45</sup> The equidistant or “median” line thus remains the fundamental starting point in the adjudication or negotiation of maritime boundaries.<sup>46</sup>

Sovereignty over the Senkaku islands is therefore a hugely important factor in the delimitation of the maritime boundary between China and Japan in the narrow East China Sea. Taking what seems to be the prevailing view among international legal commentators – that at least some members of the Senkaku group are full islands capable of projecting an EEZ – the group’s value as base points for Chinese or Japanese maritime claims is evident.<sup>47</sup> If the maritime boundary between China and Japan were to be drawn along an equidistant median line, sovereignty over the Senkakus could determine control over 19,800 square nautical miles of sea and seabed.<sup>48</sup>

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*and Proportionality in Maritime Boundary Delimitation*, in 1 INTERNATIONAL MARITIME BOUNDARIES 203, 203–215 (Jonathan Charney & Lewis Alexander eds., 1993) (observing that “equidistance has been the only serious contender for acceptance as a preferred or privileged method” of maritime boundary delimitation, and finding that of surveyed delimitations between opposite coasts, fifty-five boundaries, or eighty-nine percent, are based on the “equidistance method”).

<sup>45</sup> See *Maritime Delimitation in the Area Between Greenland and Jan Mayen* (Den. v. Nor.), 1993 I.C.J. 38, 58 (June 14) (favoring an “equidistance-special circumstances rule” for maritime delimitations); *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bah.) 2001 I.C.J. 40, 111 (Mar. 16) (stating that the court “will first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line.”).

<sup>46</sup> The two possible equidistance lines in the Senkaku Islands dispute are shown in a map included in PRESCOTT & SCHOFIELD, *supra* note 4, at 627.

<sup>47</sup> See PRESCOTT & SCHOFIELD, *supra* note 4, at 437 (“The Diaoyu Dao/Senkaku Islands consist of five islands and three rocks . . . .”); William B. Heflin, *Diaoyu/Senkaku Islands Dispute: Japan and China, Oceans Apart*, 18 ASIAN-PAC. L. & POL’Y J. 1, 2 (2000) (describing the Senkaku islands as “five small volcanic islands and three rocky outcroppings”); Steven Wei Su, *The Tiaoyu Islands and Their Possible Effect on the Maritime Boundary Delimitation between China and Japan*, 3 CHINESE J. INT’L L. 385, 398 (2004) (stating that at least two of the Senkakus are “non-rock islands”).

<sup>48</sup> PRESCOTT & SCHOFIELD, *supra* note 4, at 438 (“The two lines of equidistance . . . enclose an area of 19,800 sq. nm (67,800 sq. km) and almost all of it is sea and seabed.”).

The Senkakus are also important with respect to China's insistence that its continental shelf rights extend, by "natural prolongation," to the "Okinawa Trough"<sup>49</sup> ("Trough"). The Trough is a deep chasm in the sea floor, just west of and parallel to Japan's Ryukyu islands and a considerable distance to the east of the Senkakus. Sovereignty over the islands would extend Japan's maritime jurisdiction across this putative natural boundary and thus seriously undermine China's claim that the Trough forms a "natural" boundary. Even if UNCLOS calls for the Sino-Japanese maritime boundary to be determined "equitably," the Trough and the median line are the intuitive choices. If Japanese sovereignty over the Senkakus pushes the boundary west of the Trough, then the median line is the presumptive boundary. On the other hand, Chinese sovereignty over the Senkakus would reinforce the position that the Trough represents the end of China's "natural extension."<sup>50</sup>

### 2.2. *The Customary International Law of Territorial Acquisition*

There is no international convention as to how states should acquire sovereignty over disputed territories. Customary international law nevertheless recognizes at least five "modes of territorial acquisition" which have emerged from the decisions of international judicial bodies and arbitral panels: discovery and occupation, cession, accretion, conquest, and prescription.<sup>51</sup> These modes or theories of territorial acquisition generally guide tribunals considering questions of sovereignty. Specific agreements reached in treaties will of course override these background rules. Three of these modes—discovery and occupation, cession, and prescription—arguably apply to the Senkaku islands.

The first and most important is discovery and occupation. Occupation is the usual means for a state to gain sovereignty over a territory that was previously *terra nullius*, that is, territory belonging to no sovereign. Under customary international law,

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<sup>49</sup> ZHANG YAOGUANG & LIU KAI, LIAONING NORMAL UNIVERSITY MARITIME ECONOMIC SUSTAINABLE DEVELOPMENT RESEARCH CENTER, A STUDY OF EAST SEA OIL AND GAS RESOURCES AND THE CHINA-JAPAN EAST SEA CONTINENTAL SHELF DEMARCATION DISPUTE 5 (Gabriel B. Collins trans., 2006) (claiming that the Trough is the "natural dividing line" between China and Japan).

<sup>50</sup> *Id.*

<sup>51</sup> Lee, *supra* note 16, at 1-2.

discovery alone is not enough to give sovereignty over a body of land.<sup>52</sup> Sovereign title can only be created by affirmative demonstration of intent to occupy (*animus occupandi*) a territory.<sup>53</sup> To preserve a sovereign title, occupation must be "effective." What counts as "effective" title can vary widely. International courts and arbitrators have described effective occupation as containing two elements: the intention to act as a sovereign (*animus occupandi*) and the actual exercise of sovereign authority.<sup>54</sup> They have also recognized that different levels of state activity are appropriate for different types of territory: minimal levels of government activity may be enough to demonstrate sovereignty over uninhabited areas.<sup>55</sup>

A wide range of government activities have been recognized as evidence, or *effectivités*, of sovereignty. A non-exhaustive list includes military patrols, regulation of trading, mining or other economic activity, authorizing scientific expeditions, investigating

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<sup>52</sup> See SURYA P. SHARMA, TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW 47-48 (1997) (stating tha symbolic possession was also required to give sovereignty).

<sup>53</sup> *Id.* at 47-50. Raising a flag or a cross or building a fort or a settlement are all classic methods of displaying the requisite *animus occupandi*.

<sup>54</sup> It is not enough for a state to have an inchoate title through discovery of a territory. It must take affirmative steps to cement that title. See *Island of Palmas Arbitration (U.S. v. Neth.)*, 2 R. Int'l Arb. Awards 829, 846 (Perm. Ct. Arb. 1928) (holding that sovereign rights created at the time of an island's discovery could only be preserved through "continuous and peaceful" exercise). The dispute concerned an island lying between the Philippines and the Dutch East Indies. The U.S. had acceded to Spanish rights in the Philippines after the Spanish American War. The Permanent Court of Arbitration held that acquiring sovereignty over a territory requires "effective occupation" and a "continuous and peaceful" display of authority over that territory. *Id.* See also *Eritrea v. Yemen*, 22 R. Int'l Arb. Awards 211, 268 (Perm. Ct. Arb. 1998), available at [http://www.pca-cpa.org/showfile.asp?fil\\_id=458](http://www.pca-cpa.org/showfile.asp?fil_id=458) ("The modern international law of the acquisition (or attribution) of territory generally requires that there be: an intentional display of power and authority over the territory, by the exercise of jurisdiction and state functions, on a continuous and peaceful basis."); *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1992 I.C.J. 351, 563 (Sept. 11) (requiring "peaceful and continuous" exercise of State functions).

<sup>55</sup> See *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 43, at 50-51 (Apr. 5) ("[B]earing in mind . . . the Arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede in 1721 up to 1814 his authority to an extent sufficient to give his country a valid claim to sovereignty . . ."). See also *Advisory Opinion on the Status of Western Sahara*, 1975 I.C.J. 12, 43 (Oct. 16) (stating that in the case of claims to sovereignty over thinly populated or unsettled areas "very little in the way of actual exercise of sovereign rights" may be necessary to establish title).

criminal activity, holding judicial proceedings, registering deeds to property, building infrastructure, census-taking, and maintaining navigational markers.<sup>56</sup> Only government action can serve as evidence of sovereignty. Private commercial activity by citizens of a claimant state will not suffice, although its regulation by a government will.<sup>57</sup> When two countries claim the same territory, international tribunals will compare the degree of sovereign authority demonstrated by each claimant to reach a result.<sup>58</sup> This kind of balancing analysis seems to be the preferred method of international tribunals and will probably carry the day against contrary arguments based on irredentist history and ancient documents.<sup>59</sup>

Cession is a method for transferring sovereignty between sovereigns, in which one state voluntarily renounces its sovereign rights in a territory in favor of those of another sovereign.<sup>60</sup> Even though international law defines cession as a "peaceful transfer," the threat of force sometimes hangs over territorial cession. As one scholar explains, cession is "the common manner of disposing of territories of a defeated state" and is usually achieved by treaty.<sup>61</sup>

Prescription is the most complex of the customary modes of territorial acquisition. Under this mode, a state that fails to contest other states' assertions of sovereignty over its territory can lose its rights for failure to insist upon them.<sup>62</sup> A state failing to protest

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<sup>56</sup> See Lee, *supra* note 16, at 4-8 (discussing various modes of territorial acquisition). See also SHARMA, *supra* note 52, at 74-75, 85-94 (discussing determining factors in sovereignty disputes).

<sup>57</sup> See, e.g., *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.)*, 2002 I.C.J. 625, 683 (Dec. 17) (observing that although Indonesia states that the waters around Ligitan and Sipadan have traditionally been used by Indonesian fishermen, "activities by private persons cannot be seen as *effectivités* if they do not take place on the basis of official regulations or under governmental authority.").

<sup>58</sup> *The Minquiers and Ecrehos Case (U.K. v. Fr.)*, 1953 I.C.J. 47 (Nov. 17) (comparing the extent of British and French sovereign activity on disputed Channel islands).

<sup>59</sup> *Id.* at 57 ("What is . . . decisive . . . is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.").

<sup>60</sup> SHARMA, *supra* note 52, at 136-41 (noting that disputes concerning cessions are infrequent but may arise about the interpretation of relevant agreements, and especially the extent of the territory ceded).

<sup>61</sup> Lee, *supra* note 16, at 8.

<sup>62</sup> SHARMA, *supra* note 52, at 118-19 ("[I]f the adversary of any affected or interested state does not challenge the exercise of sovereignty over a prolonged

another's invasion of its sovereign rights may be deemed to have acquiesced to a rival's sovereignty over the territory in question.<sup>63</sup> Maps can be important in establishing territorial acquisition by prescription or acquiescence. If a government acknowledges the accuracy of a map, it may be held to the demarcation of sovereign rights depicted therein.<sup>64</sup> Prescriptive acquisition of sovereignty is analogous to the common law doctrine of adverse possession but it is much less reliable in its operation. Most importantly, customary international law has not congealed solidly enough to indicate how many years must pass without protest from a prior sovereign for its title to lapse.<sup>65</sup> There may also be a presumption against finding that a claim has lapsed.<sup>66</sup> Nor does customary international law appear to have recognized hardship as an excuse for a country's failure to protest a rival's invasion of its sovereign rights.<sup>67</sup> Transfers of sovereignty by prescription may thus lack legitimacy in the eyes of a dispossessed state.

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period, the exclusive display of sovereignty is proved and the title acquires absolute validity.”).

<sup>63</sup> See, e.g., Clipperton Island Arbitration Award (Fr. v. Mex.) (Jan 28, 1931) *in* 26 AM. J. INT'L L. 390, 393 (1932) (noting that Mexico was deemed, in 1931, to have lost any title it held in a disputed island for failure to respond to a French naval officer's 1858 declaration of sovereignty in a Honolulu newspaper, made during the course of his circumnavigation of the world).

<sup>64</sup> See, e.g., Temple of Preah Vihear (Cambodia v. Thail.), 1961 I.C.J. 17 (May 26) (noting that Thailand's failure to take exception to the boundaries depicted in maps formally presented by French colonial authorities was considered acquiescence to the boundaries therein depicted).

<sup>65</sup> See, e.g., SHARMA, *supra* note 52, at 109, 118 (explaining that the customary rule requires nothing more exact than the passage of “a reasonable time” or a “prolonged period”).

<sup>66</sup> See Seokwoo Lee, *Territorial Disputes among Japan, China and Taiwan Concerning the Senkaku Islands*, 3 BOUNDARY AND TERRITORY BRIEFING 7, at 23-24 (2002) (suggesting that the length of time that must pass “varies according to the circumstances, including: the urgency of the need for governmental control in the area [and] the degree of control exercised in the area by a rival state”); see also D.P. O'CONNELL, 1 INTERNATIONAL LAW 444 (1970) (“where the intention to abandon territory is established and unquestionable then the presumption is rebutted, but there are few instances where this is the case”), *quoted in* Lee, *supra* note 66, at 24.

<sup>67</sup> See, e.g., Clipperton Island Arbitration Award, *supra* note 63. Given the limited communications technology of the time, Mexico could not reasonably have had notice of territorial claims published in the Honolulu newspapers of 1858. Indeed, King Victor Emmanuel III of Italy, who arbitrated the case, acknowledged that the “regularity” of the French occupation “has also been questioned because the other Powers were not notified of it,” but decided in France's favor anyway. *Id.* at 394.

## 3. ORIGINS OF THE DISPUTE

Only recently, however, has the bearing of these legal principles upon the Senkaku islands attracted much interest. For centuries, sovereignty over the Senkaku islands would hardly have seemed a great prize. Chinese sailors used the islands as a navigational marker as early as the fourteenth century.<sup>68</sup> China never made any attempt to settle on the islands, however, nor to formally mark them as its territory.<sup>69</sup> In 1895, the Japanese government declared that the islands had until then been *terra nullius*, and announced their formal annexation to Japan.<sup>70</sup> The islands were then essentially forgotten. At the end of World War II, Japan conceded that U.S. authorities should administer the Senkakus.<sup>71</sup> The United States returned the islands to Japanese administration in 1972.<sup>72</sup>

The Senkakus only became important after a 1968 study by the United Nations Economic Commission for Asia and the Far East suggested that vast quantities of oil and gas might lie beneath the East China Sea.<sup>73</sup> The most promising area identified was "a 200,000 square kilometer area just north of Taiwan, or almost exactly the location" of the Senkaku islands.<sup>74</sup> Little actual drilling has taken place to this day, but some estimates suggest that as many as 100 billion barrels of oil and 200 trillion cubic feet of gas

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<sup>68</sup> See UNRYU SUGANUMA, *SOVEREIGN RIGHTS AND TERRITORIAL SPACE IN SINO-JAPANESE RELATIONS: IRREDENTISM AND THE DIAOYU/SENKAKU ISLANDS* 45-51 (2000) (analyzing records of fourteenth century sailing missions).

<sup>69</sup> See Tao Cheng, *The Sino-Japanese Dispute Over the Tiao-yu-tai (Senkaku) Islands and the Law of Territorial Acquisition*, 14 VA. J. INT'L. L. 221, 260 (1974) (observing that "Chinese officials had never demonstrated any intent to occupy [the Senkakus]; nor had they ever actually taken possession of them in the name of their sovereign").

<sup>70</sup> MINISTRY OF FOREIGN AFFAIRS OF JAPAN, *THE BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS* (Mar. 8, 1972), <http://www.mofa.go.jp/region/asia-paci/senkaku/senkaku.html>.

<sup>71</sup> They did so pursuant to Article 3 of the San Francisco Peace Treaty of 1951 which granted the United States sole "trusteeship" of the Nansei and Ryukyu islands. Treaty of Peace with Japan (U.S.-Japan) art. 3, Sept. 8, 1951, 3 U.S.T. 3169.

<sup>72</sup> Reversion to Japan of the Ryukyu and Daito Islands, U.S.-Japan, June 17, 1971, 23 U.S.T. 446.

<sup>73</sup> See K.O. Emery et al., *Geological Structure and Some Water Characteristics of the East China Sea and the Yellow Sea*, 2 UNECAFE/CCOP TECH. BULL. 3 (1969), discussed in Chiu, *supra* note 3, at 11 n.4.

<sup>74</sup> Chiu, *supra* note 3, at 11.

may be at stake.<sup>75</sup> The United Nations survey thus linked sovereignty over the Senkakus with control of potentially enormous undersea resources. Control of the islands might allow their owners to declare valuable offshore zones and to use the islands as base points in delimiting a favorable maritime boundary.<sup>76</sup>

China, like Japan, was and remains highly dependent on imported oil. Chinese leaders are determined to guard against this economic and strategic vulnerability.<sup>77</sup> Thus, mere months before the Senkakus were scheduled to return to Japanese administration, China remembered them. The Chinese Foreign Ministry fiercely condemned the "sheer and outright gangster logic" by which Japan justified its sovereignty over the islands.<sup>78</sup> The Senkakus, it insisted, "have been China's territory since ancient times."<sup>79</sup>

### 3.1. *A Dangerous Rivalry*

Tensions over the islands have simmered ever since. The strength of opposing nationalisms within the domestic politics of both countries contributes hugely to the parties' inability to set the sovereignty issue aside and cooperate in developing the East China Sea's energy resources.

Unfortunately, appeals to sovereignty and territorial integrity have "intense symbolic value" in China and Japan.<sup>80</sup> Japanese aggression during the nineteenth and twentieth centuries makes Japan especially resented in China.<sup>81</sup> The Chinese public remembers Japan's brutality during World War II and bridles at

<sup>75</sup> See HARRISON, *supra* note 5, at 5.

<sup>76</sup> When the dispute first arose, the 1958 Shelf Convention, represented the relevant international law. Continental Shelf Convention, *supra* note 40. Although UNCLOS was different from the Shelf Convention in many respects, the basic principle of valuable offshore areas attaching to sparsely or non-inhabited islands was a feature of both treaties. See *id.* At arts. 1-2 (defining and delineating states' rights in regards to the continental shelf).

<sup>77</sup> See generally MARITIME IMPLICATIONS OF CHINA'S ENERGY STRATEGY: INTERIM REPORT (Gabriel B. Collins, et al.) (forthcoming 2008).

<sup>78</sup> Statement of the Ministry of Foreign Affairs of the People's Republic of China, Dec. 30, 1971, translated in Chiu, *supra* note 3, at 16.

<sup>79</sup> *Id.*

<sup>80</sup> Erica Strecker Downs & Phillip C. Saunders, *Legitimacy and the Limits of Nationalism: China and the Diaoyu Islands*, 23 INT'L SECURITY 114, 118 (1998).

<sup>81</sup> *Id.* See also PETER HAYS GRIES, CHINA'S NEW NATIONALISM 69 (2004) ("For over half a century . . . 'defeating the Japanese and saving the nation' has been a dual legacy at the heart of Chinese Communist claims to nationalist legitimacy.").



Japan's unapologetic attitude to its recent history.<sup>82</sup> The Chinese government encourages this attitude. Having abandoned communism, the Chinese Communist regime has justified its rule on the twin pillars of economic growth and regaining the world's respect for China's power after two centuries of colonial humiliation.<sup>83</sup> It has often played on anti-Japanese sentiment to draw attention away from domestic failures and buttress its own political legitimacy.<sup>84</sup> Having done much to encourage such attitudes, China's government cannot easily ignore them.<sup>85</sup>

Similar political forces are at work in Japan. Many Japanese believe that with the world's second-largest economy and fifth-largest military, it is time for their country to resume its place as an "ordinary global power" on the world stage.<sup>86</sup> Many others, however, are uncomfortable with their country's moving beyond its pacifist postwar constitution.<sup>87</sup> Advocates of rearmament and national pride succeed best politically when they can point to a rival that the public should, perhaps quite reasonably, fear. The result is that "China-bashing" has become "a winning formula in Japanese domestic politics."<sup>88</sup> With Japanese armed forces

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<sup>82</sup> The Japanese have not excelled at building bridges to their neighbors. See, e.g., Sebastian Moffett, *Japan's Koizumi Again Irks China with Shrine Visit*, WALL ST. J., Aug. 15, 2006, at A6 (presenting recent conflict between China and Japan); Bruce Wallace, *Abe is Adamant on Sex Slaves Comment*, L.A. TIMES, Mar. 18, 2007, at A12 (documenting current ill will between the Japanese and North Koreans).

<sup>83</sup> Downs & Saunders, *supra* note 80, at 120.

<sup>84</sup> See Ian Bremmer, *East Asia's Giants Slip Out of Control: The Rift Between China and Japan*, INT'L HERALD TRIB., May 20, 2005, at 6 (noting that in 2004 there were some 47,000 public demonstrations against Chinese authorities and that encouraging anti-Japanese nationalism has helped redirect Chinese public opinion away from low standards of living).

<sup>85</sup> Downs & Saunders, *supra* note 80, at 126 (explaining that "perceived failure... to defend China's territorial claims vigorously" exposes the government to public criticism and has "a negative impact on the regime's legitimacy"). See also GRIES, *supra* note 81, at 121, 125 (arguing that "a popular nationalism is now emerging in China that increasingly challenges the Party-state" and that "because popular nationalism can threaten the party's legitimacy, it is an increasingly significant constraint on China's Japan policy").

<sup>86</sup> See, e.g., TAKASHI INOGUCHI, JAPANESE POLITICS: AN INTRODUCTION 180, 201 (2005) (describing how, in Japanese politics, a more assertive foreign policy has developed alongside a rise in national feeling).

<sup>87</sup> See *id.* at 199-200 (describing the continued strength of pacifist attitudes in Japanese politics and foreign policy).

<sup>88</sup> Bremmer, *supra* note 84 (arguing that "reinvigorating Japanese nationalism at China's expense" helps keep Japan's ruling Liberal Democratic Party (LDP) in power). See also J. Sean Curtin, *Anti-China Fear and Loathing in Japan*, ASIA TIMES, May 4, 2005.

deployed overseas for the first time since World War II, the nationalists appear to be in the ascendant in modern Japanese politics.<sup>89</sup> Chinese saber rattling over the Senkakus tends only to justify their arguments for a stronger Japanese military and a more robust foreign policy.

Thus, if either government were to yield on the Senkakus, it would almost certainly be accused of betraying the nation to a detested and feared rival. It is difficult for an American observer to comprehend the intensity of nationalist feelings in Japan and China.<sup>90</sup> Private citizens in both countries are deeply committed to ideologies of national pride. Protests against insults to the national honor can draw tens of thousands of participants.<sup>91</sup> With regard to the Senkakus in particular, nationalist groups have repeatedly taken direct action to vindicate their countries' sovereign claims. Private Chinese and Taiwanese organizations have made repeated attempts to land on the islands and clashed with the Japanese Coast Guard.<sup>92</sup> Pro-China protestors have been taken into custody by Japanese authorities.<sup>93</sup> At least one protestor drowned after jumping into the ocean when Japanese coast guards would not let

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<sup>89</sup> See, e.g., Jonathan Watts, *End of an Era as Japan Enters Iraq*, THE GUARDIAN, Jul. 26, 2003, at 15.

<sup>90</sup> Interesting insights into Japanese and Chinese attitudes can be gained by visiting online discussion boards popular in East Asia. Some of these are written in English, which serves as a common language. The discussion of an article entitled "Japan downplays China's protest over Senkaku Islands" at Japan Today suggests an impressive amount of public engagement with the Senkaku issue. Online posters argue passionately about the proper extent of China's EEZ, whether the Senkakus are islands, and how the doctrine of territorial prescription may work. This is not a site for experts, but it is difficult to imagine American internet users debating a question of international law quite so passionately. The exchanges get ugly quickly. One poster declares that China should "send troops to the diao yus and see what japan [sic] does to [b]ack up its "jurisdiction"... if the [J]apanese coast guard interferes," he writes, "we have the internationa[l] oil conglomerate and the PLAN to back up their work. There is no need to argue, just do it." Posting of mikel to <http://www.japantoday.com/jp/news/327386/all> (Feb. 13, 2005, 12:27).

<sup>91</sup> See GRIES, *supra* note 81, at 15. (showing tens of thousands of students protesting the Belgrade bombings in 1999).

<sup>92</sup> See, e.g., *Taiwanese Activists Turn Back After Japan Warns Them Not to Land on Disputed Islands*, MAINICHI DAILY NEWS, Aug. 17, 2006; *Japan Warned to Stay Clear of Diaoyus Mission*, SOUTH CHINA MORNING POST, Oct. 25, 2006, at 3; Reiji Yoshida, *H.K. Activist Boat Turned Back from Senkakus*, JAPAN TIMES (Tokyo), Oct. 28, 2006.

<sup>93</sup> *Japan Arrests Chinese on Disputed Islands*, MAINICHI DAILY NEWS, Mar. 24, 2004; *China Demands "Unconditional" Release of Island Invaders*, MAINICHI DAILY NEWS, Mar. 25, 2004.

him land on the islands.<sup>94</sup> The Japanese government has never used lethal force against these groups, but it is not difficult to imagine matters getting out of hand.

Japanese nationalist organizations have kept pace. They too have staged landings on the islands. Building and maintaining lighthouses on the islands as a display of sovereignty is a favorite tactic of these organizations.<sup>95</sup> Despite fierce Chinese protests, the Japanese government has been unwilling to disown these structures.<sup>96</sup> Instead, the islands have become a popular destination for Japanese politicians looking to bolster their patriotic credentials.<sup>97</sup> Other incidents have been more serious. In April of 2004, a Japanese right-wing activist rammed a bus into the Chinese consulate in Osaka, Japan, in protest of China's claims to the Senkakus.<sup>98</sup>

Military posturing in the seas around the Senkakus, which Japanese forces regularly patrol, is even more alarming. In 1978, China reacted to a Japanese government statement dismissing Chinese claims to the islands as "useless," by surrounding the islands with more than 100 armed fishing boats.<sup>99</sup> As China's naval capacity has improved, it has deployed more advanced survey vessels and warships to underscore its claim.<sup>100</sup> Perhaps the most dangerous incident occurred in November 2004, when a nuclear-powered submarine of China's People's Liberation Army Navy (PLAN), entered Japanese-claimed waters near the Senkakus.<sup>101</sup> The JMSDF went on full alert for only the second time

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<sup>94</sup> Michael Sheridan, *Televised Death Raises Anger in China Sea Row*, SUNDAY TIMES (London), Sept. 29, 1996.

<sup>95</sup> See, e.g., *Chinese Activists Protest Japanese Takeover of Senkaku Lighthouse*, JAPAN ECON. NEWSWIRE, Feb. 14, 2005 (describing the origins of the nationalized lighthouse).

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *Governor Gets Involved in Senkaku Islands Feud*, JAPAN UPDATE, Mar. 16, 2007, <http://www.japanupdate.com/?id=7446> (describing the governor of Okinawa's intention to make an inspection tour of the Senkakus).

<sup>98</sup> *Man Gets 7 Yrs in Prison for Attacking Osaka Chinese Consulate*, KYODO NEWS, Sept. 26, 2005.

<sup>99</sup> David Tretiak, *The Sino-Japanese Treaty of 1978: The Senkaku Incident Prelude*, 18 ASIAN SURV. 1235, 1241-42 (Dec. 1978).

<sup>100</sup> See, e.g., *Chinese Ships Spotted off Senkaku Islands*, DAILY YOMIURI (Tokyo), May 16, 1999, at 2; *5 Chinese Naval Ships Spotted Near E. China Sea Gas Field*, JAPAN ECON. NEWSWIRE, Sept. 9, 2005; *Chinese Research Ship Detected in Japan's Economic Zone*, JAPAN TIMES, Feb. 5, 2007.

<sup>101</sup> David Pilling, *Japanese Demand an Apology from China*, FIN. TIMES, Nov. 13, 2004, at 9, available at <http://search.ft.com/ftArticle?queryText=%22Ryutaro+>

since World War II and chased the submarine with destroyers and aircraft. The Chinese Foreign Ministry later explained that the submarine had entered the area during a training mission for "technical reasons."<sup>102</sup>

These incidents are likely to continue.<sup>103</sup> Indeed, while both countries have abstained from developing hydrocarbon sources in disputed areas of the East China Sea, the China National Overseas Oil Company (CNOOC) recently began producing natural gas from a field north of the Senkakus, just inside the Chinese side of the median line claimed by Japan.<sup>104</sup> Japan may be in the earlier stages of similar moves in its claimed EEZ.<sup>105</sup> The possibility of military protection for Japanese drilling operations has been floated in the Japanese press.<sup>106</sup> These developments suggest that both sides are impatient to exploit the area's energy resources and may grow increasingly impatient with waiting to resolve their differences over the Senkakus before doing so. Unfortunately, greater activity in the disputed waters will only raise the likelihood of hostile encounters.

#### 4. LEGAL BASICS OF THE COMPETING CLAIMS

##### 4.1. Japan's Legal Claims

Japan advances three main arguments for its sovereignty over the Senkakus. It justifies its claim to sovereignty over the islands

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Hashimoto%22&page=4&id=041113001201&ct=0&nclck\_check=1.

<sup>102</sup> Mark Magnier, *China Regrets Sub Incident, Japan Says: Tokyo Asserts that Beijing has Apologized for an Intrusion by its Nuclear-Powered Vessel*, L.A. TIMES, Nov. 17, 2004, at A3.

<sup>103</sup> This article does not presume to provide an exhaustive listing of these kinds of incidents. Indeed, and especially with regard to military-to-military encounters, such a list may not even be obtainable.

<sup>104</sup> *East China Sea Gas Field in Full Output: CNOOC*, JAPAN TIMES, Aug. 5, 2006, available at <http://search.japantimes.co.jp/cgi-bin/nn20060805a7.html>; Takashi Hirokawa & Shigero Sato, *Japan Asks China to Halt Gas Output in Disputed Field*, BLOOMBERG, Feb. 1, 2007, <http://www.bloomberg.com/apps/news?pid=20601101&sid=aKIOhFCXLWsk&refer=japan>. China has at least temporarily scaled back these activities, in large part, it is thought, "to ensure a peaceful backdrop for the Beijing Olympics." Xu Yihe, *Olympian Effort to Keep the Peace*, UPSTREAM, Mar. 28, 2008.

<sup>105</sup> Yumi Wijers-Hasegawa, *Time for Japan to Shut Up and Drill: Energy Expert*, JAPAN TIMES, Apr. 11, 2006.

<sup>106</sup> *Id.*

on the grounds of occupation and discovery, effective exercise of sovereignty, and Chinese acquiescence.

First, Japan argues that the Senkakus were *terra nullius*, or no-man's land, before it took sovereignty over them.<sup>107</sup> According to the Japanese government, repeated surveys between 1885 and 1895 confirmed "that the islands were not only uninhabited but without any trace of control by China."<sup>108</sup> The Japanese government made a cabinet-level decision to incorporate the islands into Japan on January 14, 1895, and ordered the erection of a marker on the islands, declaring that they were Japanese territory and formally indicating Japan's *animus occupandi*.<sup>109</sup> Japan's position is that the islands have been Japanese territory ever since.<sup>110</sup>

Second, Japan argues that it has exercised effective sovereignty over the islands. Japan has regulated economic activity on the islands by leasing them to private businessmen collecting guano and bird feathers.<sup>111</sup> The Japanese government has also built a weather station and a heliport, conducted land surveys, and policed the islands.<sup>112</sup> Japanese coast guards patrol the surrounding waters. These government activities, Japan argues, demonstrate Japan's peaceful and continuous authority over the islands.<sup>113</sup>

Third, Japan argues that even if China once had rights over the Senkakus, it had long acquiesced in Japan's sovereignty over the islands when it made its first protest in 1971. Neither the People's Republic nor Taiwan, the Japanese insist, ever objected to Japan's

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<sup>107</sup> THE BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 70. See also Chiu, *supra* note 3, at 17–18. Chiu's translation reads more smoothly than the one on the Ministry's website.

<sup>108</sup> Chiu, *supra* note 3, at 17.

<sup>109</sup> *Id.*

<sup>110</sup> See *id.* (citing, *inter alia*, an 1895 Cabinet Decision to erect a marker on the Senkakus to formally incorporate them into the territory of Japan).

<sup>111</sup> See *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.*, 2002 I.C.J. 625, para. 145 (Dec. 17) ("[M]easures taken to regulate and control the collecting of turtle eggs and the establishment of a bird reserve must be seen as regulatory and administrative assertions of authority over territory which is specified by name.").

<sup>112</sup> See *Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.)*, 2001 I.C.J. 40, para. 197 (Mar. 16) ("The construction of navigational aids . . . can be legally relevant in the case of very small islands.").

<sup>113</sup> See *Eritrea v. Yemen*, 22 R. Int'l Arb. Awards 211, 268 (Perm. Ct. Arb. 1998), available at [http://www.pca-cpa.org/showfile.asp?fil\\_id=458](http://www.pca-cpa.org/showfile.asp?fil_id=458) (discussing criteria for peaceful and continuous authority).

control of the islands before the region's hydrocarbon potential surfaced in the late 1960s.<sup>114</sup> Indeed, the Japanese point to a number of twentieth century Chinese textbooks, from both the mainland and Taiwan, which appear to recognize the Senkaku islands as Japanese territory.<sup>115</sup> The implication of this argument is that China had no interest in the Senkakus, since as a victorious ally in World War II, it could have had them if it wanted.

Japan takes pains to distinguish the Senkakus from the territories that it seized from China under the 1895 Treaty of Shimonoseki at the end of the Sino-Japanese War.<sup>116</sup> Japan argues that its annexation of the Senkakus from a condition of *terra nullius* was legally independent of its contemporaneous seizure of Chinese territories.<sup>117</sup> This is an important distinction because the World War II-era Cairo and Potsdam Declarations both required Japan to return territories it had seized from China.<sup>118</sup> Japan agreed to the

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<sup>114</sup> See THE BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 70 ("The fact that China expressed no objection to the status of the Islands being under the administration of the United States under Article III of the San Francisco Peace Treaty clearly indicates that China did not consider the Senkaku Islands as part of Taiwan. It was not until the latter half of 1970, when the question of the development of petroleum resources on the continental shelf of the East China Sea came to the surface, that the Government of China and Taiwan authorities began to raise questions regarding the Senkaku Islands."). See generally SHARMA, *supra* note 52, at 118 (discussing the "judicial trend of putting increasing emphasis on the absence of rival acts or claims of sovereignty").

<sup>115</sup> See *Temple of Preah Vihar (Cambodia v. Thail.)*, 1961 I.C.J. 17 (May 26). For a discussion of the specific books, see Lee, *supra* note 66, at 11.

<sup>116</sup> Treaty of Peace, China-Japan, art. 2, Apr. 17, 1895, 181 Consol. T.S. 217, available at <http://www.isop.ucla.edu/eas/documents/1895shimonoseki-treaty.htm#Treaty>. Article 2 provides that "China cedes to Japan in perpetuity and full sovereignty . . . the island of Formosa, together with all islands appertaining or belonging to the said island of Formosa." Taiwan and China argue that this included the Senkakus, to which the Shimonoseki Treaty makes no explicit reference. See, e.g., Chiu, *supra* note 3, at 21 (discussing the circumstances surrounding the signing of the peace treaty).

<sup>117</sup> See THE BASIC VIEW ON THE SOVEREIGNTY OVER THE SENKAKU ISLANDS, *supra* note 70 ("These islands were neither part of Taiwan nor part of the Pescadores Islands which were ceded to Japan from the Qing Dynasty of China in accordance with Article II of the Treaty of Shimonoseki which came into effect in May of 1895.").

<sup>118</sup> The Cairo Declaration provided that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be returned to the Republic of China." Conference of President Roosevelt, Generalissimo Chiang Kai-shek, and Prime Minister Churchill in North Africa, U.S.-U.K.-P.R.C., Dec. 1, 1943, DEP'T ST. BULL., 391, 393 [hereinafter The Cairo Declaration]. See also First Cairo Conference, U.S.-U.K.-P.R.C., Nov. 26, 1943, 3 BEVANS 858 (1968) (demonstrating the unified goal of the unconditional surrender

terms of both declarations when it surrendered to China and the other allied powers at the end of World War II.<sup>119</sup> If Japan is correct that the Senkakus were *terra nullius* prior to 1895, the islands would have been properly excluded from the parcel of territories returned to China in 1945.

#### 4.2. China's Legal Claims

China defends its sovereignty over the Senkakus with three main arguments of its own. China claims that it had already exercised effective sovereignty over the islands long before their annexation by Japan and that Japan tacitly acknowledged its rights over the Senkakus. China also argues that the Cairo and Potsdam Declarations applied to the Senkaku islands and should supersede any customary international law reasoning that supports Japan's claim.<sup>120</sup>

First, China claims that it, not Japan, discovered and wielded sovereignty over the islands since at least the fourteenth century. The historical record shows that Chinese sailors of the sixteenth century used the islands as navigational reference points when sailing to collect tribute from the "Liuqiu Kingdom" of Okinawa and in defining coastal defense districts for use against Japanese pirates.<sup>121</sup> They fished in the surrounding waters, and sometimes used the islands as shelter from storms.<sup>122</sup> The Chinese have also used the islands as a traditional source of *shi cong yong* (*static arbusecula*), a rare herb used in Chinese medicine.<sup>123</sup> Indeed, in 1893, the Dowager Empress Ci Xi is said to have granted the islands to a Dr. Sheng Xuan-hui in appreciation of his services in gathering the

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of Japan). The Potsdam Declaration incorporated the Cairo Declaration and announced that Japan's sovereignty would be limited to its four main islands and such minor islands as the allies determined. Proclamation Defining Terms For Japanese Surrender, U.S.-U.K.-China, July 26, 1945, 13 DEP'T ST. BULL. 135, 137 [hereinafter The Potsdam Declaration].

<sup>119</sup> Instrument of Surrender by Japanese, Sept. 2, 1945, 59 Stat. 1733, 139 U.N.T.S. 387.

<sup>120</sup> See The Cairo Declaration, *supra* note 118, at 393 (noting that Japan should be stripped of all Pacific islands it "stole[]" from China); The Potsdam Declaration, *supra* note 118, at 137 (providing that the Cairo Declaration "should be carried out").

<sup>121</sup> See SUGANUMA, *supra* note 68, at 47-61 (referencing navigation); 61-68 (referencing naval defense).

<sup>122</sup> See Cheng, *supra* note 69, at 258 (noting that the Tiao-yu-tai Islands were often used by Chinese fishermen during emergencies).

<sup>123</sup> *Id.* at 257.

herb to treat her illness.<sup>124</sup> Such an act which would presuppose, and might in a sense declare, Chinese sovereignty over the islands.<sup>125</sup> These may seem relatively weak exercises of governmental authority over the islands, but defenders of China's claim would argue that they suffice in light of the kind of territory at stake.<sup>126</sup> On this view, China used the islands "for centuries for the only purpose for which they are suited, as a navigational aide and source of medicinal herbs."<sup>127</sup>

Second, China claims that Japan actually recognized Chinese sovereignty over the islands before it seized them in 1895.<sup>128</sup> In an 1885 letter, the Japanese Foreign Minister, Inoue Kaoru, advised his government not to "suddenly establish publicly national boundary marks" on the islands, as this might "easily invite Chinese suspicion."<sup>129</sup> Kaoru observed that "those islands are near the Chinese national boundary" and that "there are Chinese names on them."<sup>130</sup> He concluded by recommending that "[w]ith respect to the question of establishing national marks, we must wait until the time is appropriate."<sup>131</sup> Although Kaoru's letter is not an explicit acknowledgement of Chinese sovereignty, it may reflect the Japanese government's expectation that China might defend a preexisting claim, in which case the islands might not be so clearly *terra nullius*. Japan's waiting to defeat China before annexing the Senkakus reveals, China's supporters argue, a strategy for avoiding otherwise inevitable objections.<sup>132</sup> This argument is

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<sup>124</sup> *Id.*

<sup>125</sup> An interesting reproduction of the Empress' Decree is found in SUGANUMA, *supra* note 68, at 184 fig.20.

<sup>126</sup> See Legal Status of Eastern Greenland (Den. V. Nor.), 1933 P.C.I.J. (ser A/B) No. 43, at 46 (Apr. 5) (noting that "in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim"). See also Advisory Opinion on the Status of Western Sahara, 1975 I.C.J. 43, 43 (Apr. 5) (referencing previous decisions that when control over "thinly populated" areas is disputed, relatively few acts of sovereignty over the territory can suffice).

<sup>127</sup> Heflin, *supra* note 47, at 4.

<sup>128</sup> See Chiu, *supra* note 3, at 21 (stating that the islands were clearly Chinese territory when Japan surveyed them in 1895); see also Heflin, *supra* note 47, at 4 (noting that Japan had "published a map using the same color for the Diayou Islands and China, while using a different color for the Kingdom of Okinawa").

<sup>129</sup> See Chiu, *supra* note 3, at 21-22 (citing *Nihon Gaikou Bunsho* (Japanese Diplomatic Papers), Vol. 18, at 575 (1950)).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 22 (documenting that Japan waited until after a decisive victory over



bolstered by reference to early Japanese maps showing the Senkakus to be part of China.<sup>133</sup> Moreover, third party maps of the nineteenth century period tend to refer to the islands as the Tiao-yu-tai, favoring the Chinese usage.<sup>134</sup> China accordingly argues that Japan at least implicitly recognized that the Senkakus belonged to China.

Third, China argues that Japan should have returned the Senkaku islands after World War II.<sup>135</sup> The Chinese view is that Japan did indeed seize the islands under the terms of the Treaty of Shimonoseki, which granted Japan "the island of Formosa [Taiwan], together with all islands appertaining or belonging to the said island of Formosa."<sup>136</sup> For the Chinese to have protested the loss of a small group of appurtenant islands would arguably have made little sense when they were ceding an entire province to Japan.<sup>137</sup> Accordingly, China argues that the Cairo Declaration's reference to Formosa (Taiwan) should be read to cover the Senkakus as islands appurtenant to Taiwan.<sup>138</sup> It is noted that the Senkakus are "an extension of the eastern mountain chain of Taiwan."<sup>139</sup> A prewar decision by a Japanese court recognizing the Senkakus as being "appurtenant" to Formosa/Taiwan may lend some support to this view, but is likely weakened by fact that both Taiwan and Okinawa (to which the islands would otherwise presumably have been attached) were under Japanese control at

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China in 1894 to submit a proposal to establish "a national boundary mark" on the islands).

<sup>133</sup> See Chiu, *supra* note 3, at 20 (describing a Japanese book called *Sangoku Tsuuran Zassetsu* (Illustrated Picture of Communication between Three Countries), published in 1785, and showing the Senkakus to be part of China's Fukien Province).

<sup>134</sup> See Lee, *supra* note 66, at 13.

<sup>135</sup> See *Inalienable Part of China's Territory*, *supra* note 19, at 3-4 (noting that "[a]fter Japan's defeat at the end of World War II, Taiwan was returned to China, but its subsidiary islands, such as Diaoyu Islands, were placed under trusteeship of the United States without having previously consulted any concerned parties.").

<sup>136</sup> Treaty of Peace, *supra* note 116, art. 2. See also *Inalienable Part of China's Territory*, *supra* note 19 (documenting that "Japan had included Diaoyu Islands in its territory only after obtaining sovereignty over Taiwan and its subsidiary islands upon signing the Treaty of Shimonoseki").

<sup>137</sup> See *Inalienable Part of China's Territory*, *supra* note 19 (noting the Treaty of Shimonoseki included the province of Taiwan and its subsidiary islands).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

the time.<sup>140</sup> If the Senkakus were, in fact, part of Taiwan, the U.S. might have legally erred by unilaterally returning them to Japan in 1972.<sup>141</sup> It may have been under an obligation to consult with China, its World War II ally, as to whether Japan should be permitted to control the Senkakus.<sup>142</sup>

Finally, China has entrenched its claim to the islands through legislation. Its law on "The Territorial Sea and Contiguous Zone of the People's Republic of China" formally declares that the "T'iaoyutai" islands are sovereign Chinese territory."<sup>143</sup>

#### 4.3. *Evaluating the Competing Claims Under International Law*

It is difficult to judge which country has the better claim to the Senkakus. If the matter were referred to an international body such as the ICJ, Japan would probably have the stronger doctrinal argument. Japan holds the islands and administers them and has had the opportunity to demonstrate its sovereignty through a variety of forms of government action. By contrast, it is uncertain whether China's use of the islands as navigational reference points, or visits by Chinese fishermen amount to exercises of sovereign authority.<sup>144</sup> China's strongest examples of the exercise of government authority over the Senkakus seem to be their inclusion

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<sup>140</sup> Heflin, *supra* note 46, at 18.

<sup>141</sup> See *Inalienable Part of China's Territory*, *supra* note 19 (declaring that "the US and Japan made a private agreement to include Diaoyu Islands into the territory to be returned to Japan" and observing that "the territorial sovereignty of a State may not, through treaties agreed between third States, be expropriated or changed"); see also Chiu, *supra* note 3, at 14-15 (quoting Formal Statement of the Republic of China Ministry of Foreign Affairs on the Ryukyu Islands and the T'iaoyutai islets, published in *Chung-yang jih-pao* (Central Daily News), June 12, 1971, at 1 ("The consistent position of the Republic of China toward the final disposition of the Ryukyus is: This question should be, in accordance with the Cairo Declaration and [sic] Potsdam Declaration, jointly decided among the allies through consultation. . . . The Republic of China is a major ally in the war against Japan and should naturally participate in such consultation, the United States suddenly decided to return the Ryukyus to Japan, and the Republic of China is very dissatisfied.")).

<sup>142</sup> Politically, of course, this would have been highly unrealistic.

<sup>143</sup> See Chiu, *supra* note 3, at 28 n.74 (citing *Chung-huo Jen-min K'ung-kuo Kuo-wu-yuan K'ung-pao* (Gazette of the State Council of the People's Republic of China), No. 3, 69-71 (March 13, 1992)) (noting that China has enacted "The Territorial Sea and Contiguous Zone" law).

<sup>144</sup> See *Sovereignty of Pulau Ligitan and Pulau Sipadan* (Indon. v. Malay.), 2002 I.C.J. 625, para. 132 (Dec. 17) (revisiting the requirements of sovereign authority over territories with small populations).

in coastal defense districts and the Dowager Empress' grant to Dr. Sheng.

The ability of these episodes to establish Chinese sovereignty under customary international law is uncertain, since nearly four centuries separate the Empress' decree from the Ming sailors' battles against Japanese pirates.<sup>145</sup> On the one hand, China and Japan are ancient societies whose joint history stretches back millennia. Given that the islands were useless at the time in question, it is not entirely unreasonable to argue that effective occupation merely required that the Senkakus be remembered every few centuries. On the other hand, the passage of centuries might mean that any claim China had from the Ming era lapsed long before Japan's twentieth century occupation or was otherwise wasted away by prescription. Since customary international law does not necessarily recognize a doctrine of hardship or extenuating circumstances in such cases, China's effective inability to protest Japan's annexation of the islands for much of the period of Japanese control may simply be irrelevant.<sup>146</sup>

There is thus a colorable case that the islands were indeed *terra nullius* at the time of their annexation by Japan, five months before the end of the Sino-Japanese War. Although the timing is close, Japan's incorporation of the islands thus seems to be legally distinct from its annexation of large chunks of Chinese territory under the Treaty of Shimonoseki. Yet even assuming otherwise, the fact remains that from the end of the Sino-Japanese War to 1931, when Japan again invaded China, and from 1945 to 1971, a combined period of some 62 years, there is no record of any Chinese government advancing the slightest claim to the islands. An argument can thus be made that China and Taiwan acquiesced in Japan's sovereignty over the islands, and only renewed their claims when they thought doing so might bring control of nearby oil supplies.

The two sides' arguments from ancient maps and atlases probably cancel out, since both countries have made maps that ostensibly recognize their rival's claims. The mapmakers'

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<sup>145</sup> SUGANUMA, *supra* note 68, at 61-68.

<sup>146</sup> See Clipperton Island Arbitration Award (Fr. v. Mex.), 16 AM. J. INT'L L. 390, 393 (1932) (comparing the futility of Mexico's historic right to the Clipperton Islands since they had failed to satisfy the international law conditions for territorial acquisition thus leaving the island in a state of *territorium nullius*).

confusion over the islands' status likely reflects the question's irrelevance at the time that the maps were made.

Yet however well Japan's argument for sovereignty over the Senkakus succeeds as a technical matter, it has difficulty escaping the ugly realities of Sino-Japanese history. However Japan parses the facts, its annexation of the islands occurred at the height of the Sino-Japanese War. China was in no position to lodge a polite diplomatic protest while Japan smashed the Chinese army and navy and seized valuable territories.<sup>147</sup> The Sino-Japanese war hastened the collapse of the Qing dynasty and pushed China into a half-century of warlordism, chaos, and Japanese intervention. China's failure to contest the sovereignty of the Senkaku islands after World War II is similarly unsurprising. The 1940s and 1950s were another time of enormous upheaval in China, marked by civil war and famines that left millions dead. Complicating matters further, mainland China did not have diplomatic relations with Japan until 1972.<sup>148</sup>

A Chinese observer might reasonably insist that his country was taken advantage of by over nearly a century of exploitation by foreign powers—of which Japan was but one—and that China protested as soon as it could. Since 1971, at least, China has done anything but acquiesce to Japan's control of the Senkakus. An international adjudication that ignored this historical narrative would not enjoy much legitimacy in China. If an international tribunal told them that they should have preserved their rights by a timely protest in 1895, many Chinese might conclude that Japan had gotten away with improper imperialist gains because of a legal technicality.

On the other hand, any litigation between China and Japan would be a seminal event in international law. Adjudicators would be conscious that they were deciding the claims of two of the world's richest and most powerful countries. Far more would be at stake than the subject matter in the cases that would serve as likely precedents, such as the *Minquiers and Ecrehos Case*, a relatively friendly disagreement over who should have sovereignty

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<sup>147</sup> There are few comprehensive histories of the Sino-Japanese War available in English. The best account available appears to be STEWART LONE, *JAPAN'S FIRST MODERN WAR* (1994).

<sup>148</sup> See Treaty of Peace and Friendship Between Japan and the People's Republic of China, Japan-P.R.C., Aug. 12, 1978, 1225 U.N.T.S. 269 (Extending diplomatic recognition from Japan to the People's Republic of China over the Republic of China on Taiwan).

over small islands in the English Channel.<sup>149</sup> The panel's views about the proper time scales to apply, and the propriety of excusing China's arguable failure to timely protest Japan's actions on the islands would likely determine the outcome.

#### 5. INTERNATIONAL LAW'S UNHELPFUL ROLE IN THE SENKAKU ISLANDS DISPUTE

Current international law may ultimately offer no clear answer to the question of which country should be sovereign over the Senkakus.<sup>150</sup> However, the applicable international law regimes seem to have done much to make the dispute persist as long, and as dangerously, as it has.

##### 5.1. *Tying Resources to Rights*

First, the international law of the sea has caused sovereignty over the Senkakus to be worth much more than the islands themselves.

Japan and China are no longer interested in guano or rare herbs. The islands' value is almost entirely in the offshore EEZs that UNCLOS presumably attaches to them. These zones are an entirely artificial legal construction. As such, the dispute over the islands provides a good example of how universal multilateral regimes can have dangerous unintended consequences.<sup>151</sup> By projecting a 200 nautical mile EEZ from the world's coastlines, UNCLOS tried to solve the international problems that seemed important at the time it was drafted. The UNCLOS rules turned out as they did in part because developing nations wanted to project their new-found sovereignty over increasingly scarce offshore resources.<sup>152</sup> The "Cod Wars" of the 1960s and early 70s,

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<sup>149</sup> See *The Minquiers and Ecrehos Case (U.K. v. Fr.)*, 1953 I.C.J. 47 (Nov. 17).

<sup>150</sup> See SUGANUMA, *supra* note 68, at 42 (acknowledging the "failure of international law" in the Senkaku islands dispute).

<sup>151</sup> See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. (forthcoming Issue 2) (critiquing the efficacy of multilateral, as opposed to bilateral, arrangements, which can better reflect the political and strategic realities of two particular states).

<sup>152</sup> See EDWARD L. MILES, *GLOBAL OCEAN POLITICS: THE DECISION PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1973-1982*, at 18-21 (Martinus Nijhoff 1998) (explaining that the UNCLOS negotiations were a North-South "fight to redistribute ownership and control over world ocean resources" and that for the less maritime developing nations participating in the negotiations, "the symbolic issues were paramount").

in which the Icelandic Coast Guard and Royal Navy tussled over Iceland's attempts to exclude British trawlers from a 200 nautical mile exclusive zone (analogous to an EEZ) were emblematic of the problems the UNCLOS drafters hoped to solve.<sup>153</sup> The participants that prevailed in the UNCLOS negotiations generally entered the conference concerned that offshore zones were too narrow, rather than too wide.<sup>154</sup> Since the Japanese and Chinese delegations seem not to have played a prominent part at the conference, it is unsurprising that the problems of East Asia's narrow seas did not figure prominently in the drafting of the treaty.<sup>155</sup> Thus, while UNCLOS' provision for a 200 nautical mile EEZ may have served the goals of its dominant drafters, it has been a major cause of trouble in the Senkakus.

This is not to suggest that the East China Sea would be free of Sino-Japanese tensions if sovereignty over the Senkakus were not such an important prize. The seas are narrow, and Japan and China might well contest the proper location of the dividing line between their EEZs even if the Senkakus sank into the sea. Nevertheless, it seems reasonable to suggest that the tone of the dispute would be much milder if physical land territory were not at stake. Land is almost always seen as a core national interest and has ready emotional appeal.<sup>156</sup> It is sovereign territory, an actual

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<sup>153</sup> See HANNES JÓNSSON, *FRIENDS IN CONFLICT: THE ANGLO-ICELANDIC COD WARS AND THE LAW OF THE SEA, 189-204* (Archon Books 1982) (placing Iceland's actions in the Cod Wars in the context of a shift in international law away from a colonialist school of thought favoring maximal freedom of the seas and minimal zones of offshore jurisdiction, towards a progressive school in which states have greater sovereign rights over offshore resources which contributed directly to the establishment of a 200 nautical mile EEZ in UNCLOS).

<sup>154</sup> See UNITED NATIONS, OFFICE OF LEGAL AFFAIRS, DIVISION FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, *THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A HISTORICAL PERSPECTIVE* (1998), [http://www.un.org/Depts/los/convention\\_agreements/convention\\_historical\\_perspective.htm](http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm) (noting that wider maritime endowments were favored by "smaller States and those not possessing large, ocean-going navies or merchant fleets" and that "87 per cent of all known and estimated hydrocarbon reserves under the sea fall under some national jurisdiction as a result" of UNCLOS' EEZ regime).

<sup>155</sup> See MILES, *supra* note 152, at 24-25 (stating that there were "few, if any, common interests" between Japan and the rest of the "Asian Group" in which it was placed for the negotiations and that "China . . . had little expertise on law of the sea matters [and] . . . sought instead to embarrass the Soviet Union wherever possible"). It is interesting to speculate whether the presence of today's more economically than ideologically focused China would have made a difference at the conference.

<sup>156</sup> Beth A. Simmons, *Capacity, Commitment, and Compliance: International*

part of the country that owns it. EEZs are not *part* of a country in quite the same way, but are merely stretches of ocean and sea bottom over which a particular country enjoys added privileges.<sup>157</sup> Given that no postwar Chinese government took the least interest in the islands until after the United Nations survey, the sovereignty dispute might never even have arisen but for the international law of offshore rights.

The timing of China's first protestations of sovereignty over the Senkakus makes it highly implausible that their prime motivation was anything other than a chance at the area's potential hydrocarbon wealth.<sup>158</sup> The structure of the international law of the sea encouraged China to pursue this goal by deploying symbolically rich and ideologically potent arguments about sovereignty. Coupling the issue of sovereignty over the islands (a mostly symbolic issue) with access to the East China Sea's energy resources (an entirely pragmatic issue) has made it extremely difficult to make progress on either.

Japan and China have proven their ability to work together on economic matters.<sup>159</sup> Japanese and Chinese oil companies have admitted that they would like to cooperate in the East China Sea.<sup>160</sup>

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*Institutions and Territorial Disputes*, 46 J. CONFLICT RES. 829, 829 (2002) (observing that "[s]overeign control over territory has long been considered the quintessential feature of modern statehood. No issue is more likely to stimulate nationalist sentiments or to lead to violent interstate conflict than disputes over territory").

<sup>157</sup> UNCLOS does not grant countries sovereignty over EEZs, but merely allows them to exercise a limited number of "sovereign rights," subject to countervailing privileges for the vessels of third party nations. See UNCLOS, *supra* note 14, at art. 58 (preserving the rights of others in the exclusive economic zone). Since UNCLOS does not allow states to exclude each other from EEZs, it cannot fairly be said to create actual sovereignty.

<sup>158</sup> See Ministry of Foreign Affairs Statement, *supra* note 78 (indicating that China did not protest supposed encroachments upon Chinese territory until rights to natural resources were at stake).

<sup>159</sup> See, e.g., Paul Blustein, *China Passes U.S. in Trade with Japan*, WASH. POST, Jan. 27, 2005, at E01 (documenting when China overtook the United States as Japan's largest trading partner); *Japan's Trade with China Rose in 2006 for 8th Consecutive Year*, INT'L HERALD TRIB., Mar. 8, 2007, available at <http://www.iht.com/articles/ap/2007/03/09/business/AS-FIN-ECO-Japan-China-Trade.php> (describing trade statistics between Japan, the United States, and China in 2006).

<sup>160</sup> See Susumu Yarita, *Toward Cooperation in the East China Sea*, in HARRISON, *supra* note 5, at 23-29. Yarita, the Managing Director of Uruma Resources Exploration Co., Ltd., a Japanese firm, describes his company's negotiations with China's CNOOC. *Id.* The companies hoped to agree on a joint development area in the East China Sea, but were ultimately stopped because of political

Unfortunately, this spirit of cooperation has not extended to issues touching on sovereignty and security. Neither government can easily abandon or moderate its claim because a point of sovereignty is a point of principle.<sup>161</sup> A government risks illegitimacy when it does not appear to be defending a nation's territorial integrity and respect among its neighbors. Although China has been willing to accept unfavorable boundary agreements for the sake of overall relations with its other neighbors, doing so will be particularly difficult in its dealings with Japan, given the powerful strain of anti-Japanese nationalism in Chinese political ideology.<sup>162</sup> Japanese leaders are similarly unwilling to appear weak in their defense of Japan's territorial claims. Thus, so long as the international law of the sea ties a pragmatic resource agreement to a perceived issue of principle, the governments will have difficulty creating the mutually beneficial arrangements, perhaps a Joint Development Zone (JDZ), upon which friendlier powers might already have agreed.<sup>163</sup>

### 5.2. A Framework for Ratcheting Escalation

Second, international law has provided a framework for ratcheting escalation of the dispute.

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interference. *Id.* After several false starts, "both sides decided to await the outcome of official negotiations on the Senkakus (Tiao Yu Tai) and EEZ before resuming dialogue on joint operations." *Id.* at 26.

<sup>161</sup> See Simmons, *supra* note 156, at 829.

<sup>162</sup> See M. Taylor Fravel, *Regime Insecurity and International Cooperation: Explaining China's Compromises in Territorial Disputes*, 30 INT'L SECURITY 46, 46-83 (2005) (detailing China's boundary settlements with Burma, Nepal, India, North Korea, Mongolia, Pakistan, Afghanistan, the Soviet Union, Kazakhstan, Kyrgyzstan and Tajikistan, and noting that "[s]ince 1949, China has settled seventeen of its twenty-three territorial disputes" and usually has been willing to accept "less than 50 percent of the contested land"). See also GRIES, *supra* note 81, at 69-85 (describing how war with Japan has shaped China's national identity).

<sup>163</sup> Both sides claim to favor joint development. The problem is that agreeing upon an area for joint development begs the question of which areas of the East China Sea fall exclusively within China's or Japan's EEZ and, consequently, that of sovereignty over the Senkakus. According to HARRISON, *supra* note 5, at 9, a major sticking point has been "the conflict between Japan's desire for a joint zone that straddles the hypothetical median line [claimed by Japan] . . . and China's position that the zone should be limited to areas on the Japanese side of the line." Although Japan makes no claim west of this median line, it is not surprising that the Japanese government should be reluctant to be the only side seeming to share something. See also Atsuko Kawasaki, *Latest East China Sea Talks End Without Deal*, PLATTS OILGRAM NEWS, Feb. 26, 2008, at 4 (discussing Japan's rejection of China's proposal regarding joint development of two gas fields near the islands).



It is much easier for either government to insist upon its claims than to back away from them. International law has armed nationalist groups with a powerful rhetoric of rights and entitlements.<sup>164</sup> The activities of the Japanese Youth Federation, a leading nationalist organization, are a case in point. When the Federation builds a lighthouse on the Senkakus, and then demands that its construction be acknowledged on official Japanese charts, the group is challenging the government in Tokyo to ratify its actions.<sup>165</sup> If the government agrees, the Federation's actions are probably transformed into assertions of Japanese sovereignty.<sup>166</sup> If the government refuses, it will be accused of weakness in the face of Chinese bullying. Since China naturally protests the Federation's activities, the Japanese government's refusal to ratify them would risk appearing to accept the legitimacy of China's claims.<sup>167</sup>

Once the Japanese government ratifies its citizens' provocations, however, a similar dilemma confronts China, though more strongly. Since China does not control the islands, it must protest vigorously, lest it should appear to acquiesce in Japan's occupation of the islands.<sup>168</sup> The result is a series of escalatory gestures. At each stage, governments face pressure to preserve their legal claims and political legitimacy through taking actions that trigger responses in kind. The 1978 Senkaku Incident, noted above, is an excellent example of this process. As the price of their support for the Treaty of Peace and Friendship between Japan and China, right-wing members of the Japanese Diet pressured a government spokesman into asserting that China's claim to the Senkakus was ridiculous.<sup>169</sup> China responded, as noted above, by issuing angry denunciations and dispatching a fleet of armed vessels to the islands.<sup>170</sup>

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<sup>164</sup> See, e.g., *supra* Sections 4.1–4.2.

<sup>165</sup> The Youth Federation has not confined itself to building lighthouses. See, e.g., *Taipei Demands Japan Remove Shinto Shrine from Disputed Isle*, KYODO NEWS INT'L, May 8, 2000, available at [http://findarticles.com/p/articles/mi\\_m0WDQ/is\\_2000\\_May\)8/ai\\_62170600](http://findarticles.com/p/articles/mi_m0WDQ/is_2000_May)8/ai_62170600).

<sup>166</sup> On aids to navigation as *effectivités* of sovereignty, see *Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain* (Qatar v. Bahr.) 2001 I.C.J. 75, 137 (Mar. 16).

<sup>167</sup> See discussion of prescription and acquiescence, *supra* Section 2.2.

<sup>168</sup> *Id.*

<sup>169</sup> See Tretiak, *supra* note 99, at 1241.

<sup>170</sup> *Id.* at 1242.

This pattern of hostile gestures over the Senkaku islands is, of course, far from the only theme in relations between Asia's two great powers. Neither government wants matters to get out of hand and lead to actual armed conflict. Regulating nationalistic activity is somewhat easier for China, where freedom of expression is not prized. Thus, while condemning Japanese activity in the Senkakus as a "gross violation" of Chinese sovereignty, the Chinese government has simultaneously denied permits for anti-Japanese protests, and even detained the leaders of anti-Japanese nationalist organizations.<sup>171</sup> Although tens of thousands of Chinese have rallied against Japan's occupation of the Senkakus in Hong Kong, Macau and Taiwan, such events are usually suppressed in mainland China.<sup>172</sup> Efforts to restrain the Chinese public's fervent anti-Japanese sentiment have provoked serious internal dissent, with some newspapers even accusing the government of a lack of patriotism in its dealings with Japan.<sup>173</sup> Beijing cannot press too hard.

Accordingly, Beijing and Tokyo find themselves trying to dampen the fires of nationalism, even while they cannot and do not want to extinguish them. The recent decision to install a "hotline" connection between the Japanese Self Defense Forces' Joint Staff Office and the Chinese Peoples' Liberation Army General Staff Headquarters reflects this dilemma.<sup>174</sup> Much as the United States and the Soviet Union did during the Cold War, Japan and China have tacitly acknowledged that a degree of military confrontation is inevitable. They are acting less to end that

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<sup>171</sup> Downs & Saunders, *supra* note 80, at 137-39. See also Anthony Spaeth, *Nationalism Gone Awry: Death in the Diaoyus*, TIME INT'L, Oct. 7, 1996, available at <http://www.time.com/time/international/1996/961007/diaoyu.html> (describing a Chinese protest over Japan's claim to the island when four activists jumped overboard to symbolically claim the waters).

<sup>172</sup> Downs & Saunders, *supra* note 80, at 135-36.

<sup>173</sup> *Id.* at 139.

<sup>174</sup> *Hotline to Link SDF, China's PLA Planned/Govt Aims to Prevent Air, Sea Skirmishes*, YOMIURI SHIMBUN, Apr. 17, 2007, available at <http://www.yomiuri.co.jp/dy/national/20070417TDY01001.htm> (translated in [http://www.ipcs.org/Apr\\_07\\_japan.pdf](http://www.ipcs.org/Apr_07_japan.pdf)).

confrontation than to try to keep it from spiraling out of control.<sup>175</sup> This can be a dangerous policy.

### 5.3. *Encouraging Legal Claims But Discouraging Legal Answers*

Third, international law has failed to provide an attractive institutional framework for Japan and China to resolve their differences over the islands.

Even where the international legal system seems to provide a legitimate framework for stating a claim, it may not enjoy enough legitimacy in a country's internal politics to make adverse outcomes tolerable. Human nature being what it is, rules often seem much more legitimate when construed to favor one's own interests than the reverse. In the absence of an enforcement mechanism, unwelcome legal decisions will not be accepted when the parties—in this case, China and Japan—care more deeply about their disputed entitlements than about treating a ruling as binding.<sup>176</sup> If, as here, ignoring an adverse decision would have severe political and diplomatic consequences, the parties may simply insist that the law is on their side but decline to put it to the test.

As we have seen, the vagueness of the international customary law of territorial acquisition encourages both sides to ground their claims in colorable legal arguments. Customary international law's ability to be all things to all parties betrays its dubious worth. All lawsuits involve a degree of uncertainty, but international sovereignty claims are especially chancy. Even if a court or arbitral panel chose to consider itself bound by decisions in past cases, there are simply too few cases and too many uncertain variables for the result of any adjudication of sovereignty over the Senkakus to be reliably predicted.<sup>177</sup> Academic solutions to the puzzle of the

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<sup>175</sup> For an extensive treatment of governments' willingness to negotiate the management, rather than resolution of armed rivalries, see generally GABRIELLA BLUM, *ISLANDS OF AGREEMENT: MANAGING ENDURING ARMED RIVALRIES* (2007) (arguing that peace and war are seldom polar totalities but increasingly can and do coexist within the confines of a single scenario).

<sup>176</sup> See generally Simmons, *supra* note 156, at 837 (finding that noncompliance with arbitral boundary decisions had occurred in about a third of post World War II cases surveyed).

<sup>177</sup> *Stare decisis* does not formally bind the International Court of Justice. See Statute of the International Court of Justice, June 26, 1945, art. 59, 59 Stat. 1055, T.I.A.S. No. 993 ("The decision of the Court has no binding force except between the parties and in respect of that particular case."). That said, past decisions are frequently cited as authority in the court's decisions. Their role is similar to that

islands' ownership tend to be overly formalistic or noticeably colored by nationalism.<sup>178</sup> Given these formidable uncertainties, it is unsurprising that the two sides have not sought to litigate or arbitrate the islands' status.<sup>179</sup>

Perhaps aware of the difficulties of its case under customary international law, China has refrained from trying to take Japan to court. Losing, particularly against Japan, would seriously undermine the Chinese Communist Party's status as the guardian of China's rights and prestige. Winning might be problematic as well. Short of war, there would be no way for China to be sure that Japan would actually turn over the islands if it lost in court.

Japan would seem to have even less incentive to go to court. Japan already controls the islands; legal proceedings could only jeopardize a position of strength. An adverse decision might force Japan to choose between antagonizing an emboldened China and losing access to much of the East China Sea's hydrocarbon resources, as well as losing face at home. Blatant refusal to comply with an international judgment would also undermine a half century's efforts to repackage Japan as a law-abiding member of the international community.<sup>180</sup>

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of past decisions of the United States Supreme Court, by which the Court considers itself bound until it decides not to be.

<sup>178</sup> See, e.g., Heflin, *supra* note 47, at 21–22 (applying an extremely formalist account of the customary international law to conclude that Japan's "post-War peaceful exercise of actual authority over the islands had extinguished China's long historical claim"); see also Chiu, *supra* note 3, at 28 (concluding that "the law apparently favors the Chinese side" on the basis of a strained reading of the Potsdam and Cairo Declarations, ancient maps and Taiwanese geography).

<sup>179</sup> See LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 187 (2d ed. 1979) (explaining that countries often decline to take cases before the ICJ because of "reluctance by political officials to let their interests in a dispute get out of the control of their own diplomacy for final determination by others" and further observing that "nations will not adjudicate matters which, they feel, they could not afford to lose or where, if they lost, they could not afford to obey the judgment"). See generally Andrew T. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. INT'L LEGAL STUD. 303 (2002) (discussing why dispute resolution is uncommon among international disputes).

<sup>180</sup> INOGUCHI, *supra* note 86, at 180. In recent talks, Japan reportedly suggested submitting the demarcation of offshore zones in the East China Sea to an international tribunal. See Yihe, *Olympian Efforts to Keep the Peace*, *supra* note 104. It is hard to gauge how serious the Japanese proposal may have been, since China quickly rejected it. *Id.* At any rate, litigating or arbitrating the demarcation of offshore zones would be a far cry from asking an international panel to determine which country has the better claim to the Senkaku islands themselves.

If these considerations discourage the parties from litigating, they provide equally little inducement for them to bargain "in the shadow of the law." Bargaining "in the shadow of the law" is a process by which parties negotiate an agreement based on their differing risk preferences in the face of potential litigation.<sup>181</sup> Such bargaining is hardly unique to domestic litigation. Countries bargain this way as well, particularly in the area of international trade, where states may most strongly recognize the legitimacy of international rules and face a credible threat of enforcement.<sup>182</sup> However, bargaining in the shadow of the law can only work when the parties share "relatively similar expectations about the opportunities and risks" of litigation or arbitration and understand the "bargaining endowments" granted them by the applicable law.<sup>183</sup> They must also be confident that each would, if necessary, accept the jurisdiction and the judgment of an adjudicating body.

These conditions do not apply in the case of the Senkaku islands. Forecasting the likely actions of an international legal body is more difficult than predicting what a domestic court will do against the background of extensively developed case law, the context in which the theory of bargaining in the shadow of the law first developed.<sup>184</sup> Furthermore, the result of any adjudication would all but inevitably be attacked as illegitimate by the losing side.<sup>185</sup> The Chinese or Japanese public might reasonably ask why their country's sovereign rights over vast resources should be

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<sup>181</sup> See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 950 (1979) (discussing "the impact of the legal system on negotiations and bargains that occur outside the courtroom"); Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, *supra* note 151, at 43 (applying the idea of "bargaining in the shadow of the law" in the international context, and suggesting that countries may reach bilateral agreements by "bargaining in the shadow" of multilateral regimes).

<sup>182</sup> See generally Marc L. Busch & Eric Reinhardt, *Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes*, 24 FORDHAM INT'L L. J. 158 (2000) (describing bargaining in the context of GATT/WTO dispute resolution).

<sup>183</sup> See ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 106 (2000); Mnookin & Kornhauser, *supra* note 181, at 968 (describing how legal rules create bargaining endowments).

<sup>184</sup> *Id.*

<sup>185</sup> See Simmons, *supra* note 156, at 835 (warning that when a country loses a territorial case before an international court "disaffected groups [may] oppose the outcome and begin to denounce the legal process and maybe the government itself").

determined according to legal rules that emerged from relatively unimportant nineteenth century disputes between Western powers.<sup>186</sup> Although China and Japan operate with the modern international legal system, they assuredly did not invent it, and as civilizations they predate it. Accepting the judgment, and perhaps even the jurisdiction, of an international adjudicatory panel might also conflict with the feelings of national pride that have inflamed the Senkaku dispute. That a judgment as to sovereignty over the Senkakus would not be accepted is, in a sense, evidenced by the fact that neither side has sought one. In the end, the apparatus of international justice appears incapable of resolving the Senkaku islands dispute.

#### 5.4. A Dangerous Stalemate

Other forces, particularly nationalist rivalry and the countervailing desire to profit from trade and economic cooperation, almost certainly have more influence upon the broader Sino-Japanese relationship than international law does. Nevertheless, insofar as international legal regimes have worked to entrench the Senkaku islands dispute, they may have helped perpetuate a serious threat to East Asia's peace and security.

At present, Tokyo and Beijing both profess willingness to share the East China Sea's offshore resources, provided, of course, that the sovereignty issue can be settled on their terms. A joint communiqué issued by the two governments after high-level meetings in April 2007, affirmed their commitment to "a strategic relationship of mutual benefit" and pledged joint "consultations" on making the East China Sea "a sea of peace, cooperation and

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<sup>186</sup> Nigeria's official reaction to the ICJ's ruling in the Nigeria-Cameroon Border Demarcation case illustrates the kind of attacks which can be made upon the legitimacy of the court and of its judgments by appealing to historical circumstances, as creating a higher law than the customary international law applied by the ICJ. See Press Release, Embassy of the Fed. Republic of Nig. in Washington, D.C., Nigeria's Reaction to the Judgment of the International Court of Justice at The Hague (Nigeria, Cameroon with Equatorial Guinea Intervening) (Nov. 7, 2002), available at [http://www.nigeriaembassyusa.org/110802\\_1.shtml](http://www.nigeriaembassyusa.org/110802_1.shtml) (insisting that French, English and German Judges should have disqualified themselves because "as citizens of the colonial powers whose action [in creating modern Africa's boundaries] had come under scrutiny, [they] acted as judges in their own cause and thereby rendered their judgment virtually null and void"). The relevant case is *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.)*, 2002 I.C.J. 325 (Oct. 10).

friendship.”<sup>187</sup> Though these exchanges may have been good for Sino-Japanese relations in the short term, it is proving extremely difficult for China and Japan to vindicate their lofty rhetoric.<sup>188</sup> Indeed, subsequent working-level talks between the two countries have stalled. Indeed, by the end of 2007, Japan and China had already held at least eleven fruitless rounds of negotiations over their maritime boundary.<sup>189</sup> Japanese and Chinese negotiators agree on the desirability of an agreement but acknowledge that they have been unable to resolve the “basic points” of a compromise.<sup>190</sup> Vague and continuing promises to reach an agreement over development of the area’s gas resources must be discounted accordingly, given the two governments’ essential intransigence.<sup>191</sup> Crucially, neither government has even suggested that it might renounce its claim to the Senkakus. As such, any agreement reached over resources will be inherently unstable and continually threatened by nationalist flare-ups over the unresolved sovereignty of the Senkakus.<sup>192</sup>

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<sup>187</sup> Press Release, Ministry of Foreign Affairs of the P.R.C., China-Japan Joint Press Communiqué (Apr. 11, 2007), available at <http://chinaembassy.org.nz/eng/zxxx/t311005.htm> (marking Chinese Premier Wen Jiabao’s visit to Japan).

<sup>188</sup> See *id.* Although the mood of the China-Japan Joint Communiqué is extremely positive, it does not commit the sides to any concrete concessions. The Communiqué pledges “high-level visits,” the establishment of a “China-Japan high-level economic dialogue mechanism,” “people-to-people and youth contacts,” “a China-Japan [e]xchange [y]ear of [c]ulture and [s]ports,” and “a ministerial dialogue on energy policy.” *Id.* The communiqué’s most important provisions are for “consultations” about the possibility of a Joint Development Zone in the East China Sea, an agreement by Japan to work harder at disposing of World War II era chemical weapons left in China by Japanese forces, and port visits to Japan and China by each other’s navies.

<sup>189</sup> See Takeo Kumagai, *East China Sea Talks Schedule Unsettled After Japan’s Cabinet Shakeup*, PLATTS OILGRAM NEWS, Aug. 29, 2007, at 2 (describing Japan’s efforts to renew bilateral talks); see also *Signing of Japan-China Accord on Delimiting Gas Deposits Improbable*, ITAR-TASS, Dec. 18, 2007 (predicting failure of the agreement).

<sup>190</sup> See *Japan, China Grow Apart Over Gas Row, Agree to Compile Plan by Fall*, JAPAN ECON. NEWSWIRE, June 26, 2007 (reporting the difficulty in reaching consensus).

<sup>191</sup> See, e.g., Mure Dickie & David Pilling, *Beijing Sees End to Gas Dispute with Japan*, FIN. TIMES, Jan. 19, 2008, at 5 (providing evidence of dispute impasses).

<sup>192</sup> See *id.* (quoting Japanese and Chinese observers suggesting that the governments are looking for a “deliberately ambiguous” agreement that would allow development of the area’s gas reserves “without ceding ground on territorial or legal questions” (emphasis added)).

Unfortunately, the prospects for a genuine and peaceful settlement of the islands' status may only grow worse over time. The problem is that oil and gas supplies are both finite and in rising demand. As Japanese and Chinese energy demand continues to grow, inevitable decreases in fossil fuel supplies—or instability in exporting countries—might make the two governments increasingly reluctant to share natural resources.<sup>193</sup> China is already noted for its “mercantilist” attitude to energy security and its distrust of markets.<sup>194</sup> Japan has already gone to war for oil once in the past century. Were serious supply shortages to strike the world economy, the wealth attached to the Senkakus might become an increasingly attractive prize. If either side were thirsty enough for oil, the unsettled questions of international law surrounding the islands might furnish a pretext for violent resource conflict. China might cite Japanese provocations and invasions of its sovereignty to justify seizing the islands and the resources around them by force. Alternatively, Japan might use force against Chinese protestors in ways that precipitated an armed response by China.

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<sup>193</sup> On the inevitability of fossil fuel depletion, see generally KENNETH S. DEFFEYES, *HUBBERT'S PEAK: THE IMPENDING WORLD OIL SHORTAGE* (2001); MATTHEW SIMMONS, *TWILIGHT IN THE DESERT: THE COMING SAUDI OIL SHOCK AND THE WORLD ECONOMY* (2005) and *Totally Different*, *THE ECONOMIST*, Jan. 10, 2008 (including an interview with Christophe de Margerie, CEO of French oil major Total, who believes that world oil production will not be able to meet demand over the next two decades). Although the controversy surrounding “peak oil” theory is beyond the scope of this paper, the debate is ultimately about timelines. All experts recognize that oil and gas are ultimately finite resources. Cf. Cambridge Energy Research Associates, *Why the “Peak Oil” Theory Falls Down – Myths, Legends, and the Future of Oil Resources*, Nov. 10, 2006, available at [http://cera.ecnext.com/coms2/summary\\_0236-821\\_ITM](http://cera.ecnext.com/coms2/summary_0236-821_ITM) (finding “no evidence of a peak before 2030”).

<sup>194</sup> See Gabriel B. Collins, Andrew S. Erickson & Lyle J. Goldstein, *Chinese Naval Analysts Consider the Energy Question*, in *MARITIME IMPLICATIONS OF CHINA'S ENERGY STRATEGY*, *supra* note 77, at 122, 124 (describing a “mercantilist” Chinese energy security strategy “based on the zero-sum premise that oil supplies are running out” and that “entails paying whatever it takes to secure access to reserves, emphasizing bilateral state-to-state deals, and building up a military force that can secure one's energy supply lines”). See also KENNETH LIEBERTHAL & MIKKAL HERBERG, NATIONAL BUREAU OF ASIAN RESEARCH ANALYSIS, *CHINA'S SEARCH FOR ENERGY SECURITY: IMPLICATIONS FOR U.S. POLICY* 14 (Apr. 2006), available at <http://www.nbr.org/publications/analysis/pdf/vol17no1.pdf> (explaining that the “mercantilist cast” of China's energy strategy “reflects China's sense of weakness and vulnerability regarding reliable access to energy supplies . . . provides the rationale for direct state intervention and support” and “is strongly influenced by a general mistrust of global energy markets”).



These dangers are not unique. As world oil prices continue to rise over time, governments will be willing to go further, spend more money, and run greater risks to ensure a supply of energy to their economies. There is no shortage of cases in which the dangers of bundling emotional questions of sovereignty with offshore energy rights present ominous portents. In the South China Sea, China, Vietnam, the Philippines, Brunei, Malaysia and Taiwan continue to vie for control of another strategic flashpoint, the Spratly islands. Like the Senkakus, the Spratlys are thought to project offshore rights to rich deposits of oil.<sup>195</sup> In another example, the U.S. Geological Survey estimates that as much as a quarter of the world's undiscovered oil and gas may lie in the warming Arctic.<sup>196</sup> As the icecaps melt, the United States, Russia, Norway, Canada and Denmark have begun to slip into high-stakes maritime disputes.<sup>197</sup> Russia, for example, sent an expedition to the North Pole in August of 2007 to reinforce its claim to sovereignty over all of the Arctic Ocean between Siberia and the North Pole.<sup>198</sup>

On the other side of the world, hunger for energy may also be rekindling the Anglo-Argentine dispute over the Falkland Islands (Islas Malvinas) that led to war in 1982. Argentine President Nestor Kirchner recently pulled out of a 1995 agreement to share rights to any oil found in the seas between the British Falklands and Argentina and denounced the United Kingdom's "unilateral" exploration for oil in the region.<sup>199</sup> The British government, for its

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<sup>195</sup> See MICHAEL T. KLARE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* 109-38 (2001) (describing resource conflicts over the Spratly Islands).

<sup>196</sup> See generally Doug Mellgren, *Riches Await as Earth's Icy North Melts*, USA TODAY, Mar. 24, 2007, available at [http://www.usatoday.com/tech/science/2007-03-25-melting-north\\_N.htm](http://www.usatoday.com/tech/science/2007-03-25-melting-north_N.htm) (describing that the "international race for oil . . . [is] accelerated by the impact of global warming"); Beth Gorham, *Muscling in on the Arctic; U.S. Icebreakers Urged to Counter Canadian Flag-Waving*, DAILY HERALD-TRIBUNE (Grande Prairie, Alberta), Sept. 29, 2006, at 47 (describing U.S. scientists' arguments that the United States needs to do more to access oil supplies in the Arctic).

<sup>197</sup> *Id.*

<sup>198</sup> See James Graff, *Fight for the Top Of the World*, TIME, Sept. 19, 2007, at 39 (reporting that the Russian expedition actually planted a Russian flag on the seabed below the North Pole).

<sup>199</sup> See Monte Reel, *Falkland Islands An Unsettled Issue 25 Years After War; Contending Claims by Argentina, Britain Burden Relations as Anniversary Nears*, WASH. POST, Jan. 8, 2007, at A11 (illustrating the contending claims of Argentina and Britain); Sophie Arie, *Argentina Scraps Falkland Oil Agreement*, THE TELEGRAPH, Mar. 29, 2007, available at <http://www.telegraph.co.uk/news/>

part (as of the time of writing), appears to be preparing a massive submission to the United Nations Commission on the Limits of the Continental Shelf which would support Britain's claim to extend its economic rights in the South Atlantic beyond the UNCLOS treaty's default 200 nautical miles.<sup>200</sup> The proposal has sparked outrage in Argentina and coincided—perhaps not coincidentally—with the deployment of a Royal Marines unit to the islands.<sup>201</sup>

International law may yet help to prevent these and similar disagreements from turning into armed conflict. International lawyers should nevertheless be sensitive to the possibility that international law's frequent bundling of access to offshore resources with disputes over sovereignty may have dangerous results. In every case, of course, the varying resonance of nationalist appeals in the countries concerned, the parties' respective willingness to gamble their claims in international legal proceedings, and the value, or supposed value, of the resources at stake, will impact how effectively and peacefully disputes are resolved.

## 6. CONCLUDING REFLECTIONS

In advancing these arguments about how international law may have rendered the Senkaku dispute more intractable and more dangerous, this paper does not mean to suggest that there is no place for international law in sovereignty and resources disputes. The hope is, rather, that pointing out the shortcomings of the international legal system in one case will help make it stronger and more effective in the future. It is important to consider the questions posed without leaping to conclusions:

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main.jhtml?xml=/news/2007/03/28/wfalks128.xml (signaling the deteriorating relations between the two countries).

<sup>200</sup> Oliver Balch & Colin Freeman, *Argentina Fury at UK Bid for Falkland Seas*, THE TELEGRAPH, Sept. 23, 2007, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/09/23/wfalk123.xml>. See also UNCLOS, *supra* note 14, at art. 76(8) (outlining guidelines for changes to the outer limits of the continental shelf).

<sup>201</sup> See *Royal Marines Back in the Falklands for [sic] Exercise Commando Strike*, MERCOPRESS, Sept. 28, 2007, available at <http://www.mercopress.com/vernocia.do?id=11478&formato=html> (noting the British government's explanation that the Marines have been deployed to train for operations in Afghanistan and Iraq). The timing seems significant nonetheless. The exercise represents the largest Royal Marines deployment to the islands since the Falklands War. *Id.*

For example, UNCLOS's likely attachment of a vast offshore jurisdiction to the otherwise worthless Senkaku islands tempts the conclusion that EEZs and other maritime jurisdictional areas should be trimmed closer to shore. This may be mistaken. In disputes prior to the UNCLOS Convention, it was precisely the lack of extensive offshore rights that triggered maritime tensions.<sup>202</sup> One size does not fit all. A better approach may be to deemphasize the universality of the law of offshore rights in favor of regional and bilateral accords. These could be better tailored to the geography of a given maritime area.<sup>203</sup> Had regional governments negotiated a Convention on the "Law of East Asian Seas" they would probably have chosen a figure lower than 200 nautical miles as the standard EEZ projection.

That disputes over territory can provoke increasingly hostile "displays" of sovereign authority may be beyond the power of the international legal community to solve. A "United Nations Convention On Sovereignty Over Obscure Territories" is unlikely to succeed or to remedy the dangerous vagueness of this area of international law. The only solution may lie in conscious efforts by governments, international civil society, and individuals concerned with preserving peace to deemphasize the relevance of the concept of "sovereignty" to intrinsically worthless and uninhabited territories.

As to the failure of the parties to avail themselves of the international judicial system, it seems unreasonable to expect states to submit matters of major national interest to tribunals of dubious legitimacy that apply fuzzy law. Over the long term, it may be healthier for the international legal community to acknowledge the inadequacies of the customary law of territorial acquisition and admit that there is no real law governing many such disputes. In the case of the Senkakus, regional stability might be better served by throwing away the Dowager Empress' musty decrees and engaging in old fashioned pie-slicing unencumbered by the divisive language of legal entitlements.

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<sup>202</sup> See *supra* notes 153, 154 (describing the development of the UNCLOS regime).

<sup>203</sup> Universalist approaches may be more appropriate in those areas of the Law of the Sea that are not geographically contingent, such as navigation rights and the rights of flag and port states over vessels within their jurisdiction.

Finally, the best solutions to the world's resource conflicts may lie outside of the legal sphere. Just as the 1968 United Nations study vested the Senkakus with an importance they had never had, the efficient development of nuclear, solar, and other alternative fuel sources might reduce demand for hard-to-extract undersea oil and gas, calming resource conflicts in the Senkakus and other zones of contention.